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In The

# Supreme Court of the United States

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT,
XAVIER AGUILAR, DAVE DESPOT,
MARK DARLING & MARK REPCIK,
*Petitioners*,

v.

CENTER FOR BIOETHICAL REFORM,
PAUL KULAS & THOMAS PADBERG,
*Respondents*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Here, the power given to schools to protect the sanctity of the school environment clashes with the ban on the heckler's veto. In a published decision, the Ninth Circuit Court of Appeals has limited government's right to protect the school environment by holding that speech in and around schools can only be limited if the **manner** in which the speech is conveyed is disruptive ---- and not if the content of the speech itself causes a substantial disruption to the school environment. This ruling conflicts with relevant Supreme Court precedent, and presents the following important federal questions:

1) Can school and law enforcement officials restrict speech that causes a substantial disturbance at a school even if the manner in which the speech is presented is not in and of itself disruptive?

2) Is there an exception for schools with regard to the ban on the heckler's veto?

3) Did sheriff's deputies violate the First Amendment by instructing anti-abortion protestors with large, graphic photographs of aborted fetuses to leave the perimeter of a middle school when their presence created a substantial disruption?

4) Where an appellate court, such as the Ninth Circuit, admits that the application of a law to a particular circumstance is unclear, does qualified immunity shield police officers from liability for the length of the detention while the officers investigate the application of the unclear law?

## PARTIES TO PROCEEDINGS BELOW

The parties to the proceeding below are Petitioners (Defendants and Appellees below), Los Angeles County Sheriff's Department, Xavier Aguilar, Mark Darling, John Despot, and Mark Repcik, and Respondents (Plaintiffs and Appellants below) Center for Bio-Ethical Reform, Mark Kulas, and Thomas Padberg.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

PARTIES TO PROCEEDINGS BELOW ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

CITATIONS FOR OPINIONS BELOW ..... 1

BASIS FOR JURISDICTION IN THIS COURT .. 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE ..... 1

STATEMENT OF THE CASE ..... 4

I. FACTUAL BACKGROUND ..... 4

II. PROCEDURAL HISTORY ..... 9

REASONS FOR GRANTING CERTIORARI .... 11

LEGAL ARGUMENT ..... 14

I. THE RIGHT OF GOVERNMENT TO MAINTAIN A PEACEFUL SCHOOL ENVIRONMENT NEEDS TO BE RECONCILED WITH THE BAN ON THE HECKLER'S VETO. ..... 14

A. A "School Exception" to the Ban on the Heckler's Veto Is Consistent with this

Court's Mandate Regarding First Amendment Rights In and Around Schools. ..... 14

1. Government should not have to tolerate substantial disruption in schools — no matter what manner of speech creates it. ..... 16

2. Government can control speech at schools so long as the restrictions are reasonably related to legitimate pedagogical concerns. ..... 18

3. Different First Amendment considerations apply to adult speech if the speech reaches an audience of children. ..... 21

B. The Ninth Circuit's Focus on the Manner of the Speech as the Only Determinative Factor to Justify Speech Restrictions at Schools Is Impractical and Inconsistent with Legal Precedent. ..... 22

C. Petitioners Imposed a Reasonable Time, Place, and Manner Restriction on CBR's Speech. ..... 24

II. POLICE OFFICERS SHOULD BE ENTITLED TO QUALIFIED IMMUNITY FOR THE TIME INVESTIGATING WHEN EVEN THE CIRCUIT COURT OF APPEALS FINDS THAT THE LAW WAS UNCLEAR AND THAT THE

CIRCUMSTANCES THE OFFICERS FACED WERE NOVEL. ..... 27

A. Qualified Immunity Should Protect an Officer's Attempt to Investigate and Apply an Unclear Law. ..... 29

B. The Ninth Circuit's Ruling Contradicts its Own Precedent, and That of Other Circuits Regarding the Reasonable Length of a Detention. ..... 31

CONCLUSION ..... 34

APPENDIX

Appendix A: Ninth Circuit Opinion (July 2, 2008) ..... 1a

Appendix B: District Court Order on Cross-Motions for Summary Judgment (January 24, 2005) ..... 39a

Appendix C: District Court Complaint (April 17, 2003) ..... 55a

## TABLE OF AUTHORITIES

**Cases**

*Adams v. Williams*,
407 U.S. 143 (1972) ..... 29

*Anderson v. Creighton*,
483 U.S. 635 (1987) ..... 27

*Bethel School Dist. No. 403 v. Fraser*,
478 U.S. 675 (1986) ..... 18, 19, 22

*Downs v. Los Angeles Unified Sch. Dist.*,
228 F.3d 1003 (9th Cir. 2000) ..... 22

*Epperson v. Arkansas*,
393 U.S. 97 (1968) ..... 16, 23

*Florida v. Bostick*,
501 U.S. 429 (1991) ..... 28

*Forsyth County v. Nationalist Movement*,
505 U.S. 123 (1992) ..... 12

*Gallegos v. City of Los Angeles*,
308 F.3d 987 (9th Cir. 2002) ..... 28, 29, 31

*Ginsberg v. New York*,
390 U.S. 629 (1968) ..... 21

*Grayned v. City of Rockford*,
408 U.S. 104 (1972) ..... 11, 16, 17, 18, 26

*Harper v. Poway Unified Sch. Dist.*,
445 F.3d 1166 (9th Cir. 2006) ..... 22

*Hazelwood v. Kuhlmeier*,
484 U.S. 260 (1988) ..... 11, 14, 15, 19

*Lavine v. Blaine School Dist.*,
257 F.3d 981 (9th Cir. 2001) ..... 16, 23

*M.W. v. Panama Buena Vista Union School Dist.*,
110 Cal.App.4th 508 (2003) ..... 16

*Malley v. Briggs*,
475 U.S. 335 (1986) ..... 28, 30

*Morse v. Frederick*,
551 U.S. ___, 127 S.Ct. 2618 (2007) .. 19, 20, 22

*PETA v. Rasmussen*,
298 F.3d 1198 (7th Cir. 2002) ..... 26

*Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*,
941 F.2d 817 (9th Cir. 1991) ..... 19

*Rodriguez v. Inglewood Unified School Dist.*,
186 Cal.App.3d 707 (1986) ..... 24

*Saucier v. Katz*,
533 U.S. 194 (2001) ..... 27, 28

*Scott v. School Bd.*,
324 F.3d 1246 (11th Cir. 2003) ..... 22

*Texas v. Brown*,
460 U.S. 730 (1983) ..... 28

*Tinker v. Des Moines Independent Comm. Sch. Dist.*,
393 U.S. 503 (1969) ..... 11, 17, 22

*United States v. American Library Association*,
539 U.S. 194 (2003) ..... 21

*United States v. Frost*,
999 F.2d 737 (3d Cir. 1993) ..... 32

*United States v. Hodoyan-Palacios*,
993 F.Supp. 789 (S.D. Cal. 1998) ..... 31

*United States v. McCarthy*,
77 F.3d 522 (1st Cir. 1996) ..... 32

*United States v. Richards*,
500 F.2d 1025 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1995) ..... 31

*United States v. Rutherford*,
824 F.2d 831 (10th Cir. 1987) ..... 32

*United States v. Sharpe*,
470 U.S. 675 (1985) ..... 28, 32

*United States v. White*,
42 F.3d 457 (8th Cir. 1994) ..... 32

*Vernonia Sch. Dist.47J v. Acton*,
515 U.S. 646 (1995) ..... 15, 16

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989) ..... 25, 30

*Ward v. San Diego County*,
791 F.2d 1329 (9th Cir. 1986) ..... 29

*Wilson v. Layne*,
526 U.S. 603 (1999) ..... 30

**Constitutional Provisions**

Cal. Const. art. I, § 28(c) ..... 24

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. IV ..... *passim*

U.S. Const. amend. XIV ..... 2

**Statutes**

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1983 ..... 1, 9

Cal. Educ. Code § 32210 ..... 10, 24, 25

Cal. Educ. Code § 32211 ..... 24

Cal. Educ. Code § 32212 ..... 24

Cal. Educ. Code § 44810 ..... 24

Cal. Educ. Code § 44811 ..... 10, 24, 25

Cal. Penal Code § 415.5 ..... 24

Cal. Penal Code § 626.7 ..... 24

Cal. Penal Code § 626.8 ..... *passim*

Cal. Penal Code § 626.8(c)(2) ..... 25

Cal. Penal Code § 653g ..... 24

**Rules**

Federal Rule of Civil Procedure 12(b) ..... 9

## CITATIONS FOR OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 533 F.3d 780 (9th Cir. 2008), and is reprinted at 1a-38a. The decision of the district court granting the Petitioners' motion for summary judgment was not reported, and is reprinted at 39a-54a.

## BASIS FOR JURISDICTION IN THIS COURT

The Ninth Circuit Court of Appeals filed its opinion on July 2, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

## CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the Respondents pursuant to 42 U.S.C. § 1983, which reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

The Respondents allege that the Petitioners violated their civil rights by applying California Penal Code § 626.8 in violation of their First, Fourth and Fourteenth Amendments to the United States Constitution. The relevant parts of these statutes read as follows:

***First Amendment:***

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

***Fourth Amendment:***

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be searched and the persons or things to be seized.

***Fourteenth Amendment (Section 1):***

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

***California Penal Code § 626.8, Disruptive Presence at Schools ...***

(a) Any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities, is guilty of a misdemeanor if he or she does any of the following:

(1) Remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by a ... sheriff or deputy sheriff.

(2) Reenters or comes upon that place within seven days of being asked to leave by a person specified in paragraph (1).

(3) Has otherwise established a continued pattern of unauthorized entry.

This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.

## STATEMENT OF THE CASE

### I. FACTUAL BACKGROUND

Dodson Middle School is located in Rancho Palos Verdes, California and serves approximately 2000 students. App. 5a, 6a. These students are generally between the ages of 11 and 13 – grades 6 through 8. App. 44a. The school is surrounded on all sides by streets. App. 6a. For the most part, the only thing that divides the streets and the school is a chain-link fence. AER[1] 2, 30, 149, 165-169. Many of the school's classrooms have windows which view the sidewalk and public streets without any intermediary. AER 2, 149, 165-169.

Plaintiffs and Respondents Paul Kulas and Thomas Padberg are an employee and a volunteer, respectively, for Plaintiff and Respondent Center for Bioethical Reform ("CBR"). App. 5a. CBR is a social reform organization who seeks to educate the public on the reality of abortion through displays of photographs of early-term aborted fetuses. App. 4a. CBR believes that a student who is old enough to have an abortion is "old enough to see one." App. 60a.

On March 24, 2003, beginning at around 7:30 a.m., Kulas drove a large box-style truck around Dodson Middle School. App. 5a, 6a, 73a-75a. Displayed on the side of the CBR truck were large, graphic images of

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[1] These exhibits were included in the Ninth Circuit record as part of the LASD Appellees' Excerpts of Record ("AER"). The original excerpts of record submitted by the CBR Plaintiffs are listed as "ER."

first-term aborted fetuses. App. 3a, 73a-75a. Padberg drove an escort security vehicle, a white Ford Crown Victoria sedan. App. 6a. Plaintiffs repeatedly drove around and around the School, and admit that they chose the 7:30 a.m. time frame to ensure the greatest exposure to the children. App. 40a.

The presence of the truck caused what one assistant principal called an "enormous" disruption at Dodson Middle School. Children typically arrive to school between 7:15 a.m. and 8:00 a.m. App. 6a. Classes at Dodson start at 8:01 a.m. App. 7a. In this case, some students would not go to their classrooms for school because they were so focused on the truck. App. 6a, 43a. Some children were upset and crying in response to the photographs and several boys became so outraged that they indicated they were going to get rocks from a construction area near the school to throw at the truck. App. 6a, 7a, 43a. Once in class, at least one class was forced to divert from their regular curriculum to spend time calming students and discussing Plaintiffs' presence. App. 7a. In fact, up to five children left school on that day because they were too upset to remain. App. 43a.

The reaction by the children at Dodson was not atypical. CBR's Executive Director acknowledged that he has seen students faint, become physically ill, weep, avert their gaze, leave the room, and stare in disbelief in response to the photographs of the aborted fetuses. App. 5a.

The CBR vehicles also caused traffic and safety concerns. App. 6a. A school official indicated that people were so focused on the CBR vehicles that

drivers were not paying attention to the streets which were full of children walking to class, and children were likewise not paying attention to the cars. AER 5, 151, 157-158. Assistant Principal Art Roberts[2] feared that an accident might ensue because both drivers and children were distracted. AER 6, 151. Roberts testified that during his tenure at Dodson, several students had been struck and two even killed by vehicles driving on the perimeter street. App. 6a.

A school official called Defendant Los Angeles County Sheriff's Department ("LASD") for assistance. App. 7a. The official stated that a large truck with graphic pictures was circling and videotaping Dodson Middle School and disrupting the school. App. 7a.

Defendants and Petitioners LASD Deputies Mark Darling and Mark Repcik responded to the call and drove to the School where they observed the CBR truck and the accompanying security vehicle. App. 7a. The deputies observed that the Crown Victoria sedan driven by Plaintiff Padberg looked very similar to a police vehicle in potential violation of California's Vehicle Code. AER 7, 108, App. 6a. The CBR security vehicle had outside spotlights, a push bar on the front bumper, an antenna mounted on the roof, red and amber flashing lights, a security cage separating the rear seat, and a video camera mounted on the dashboard. AER 7, 60, 72-73, 83; App. 6a. One of the Plaintiffs admitted that the accompanying Crown

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[2] Co-Defendant Art Roberts has also filed a Petition for Writ of Certiorari in this matter.

Victoria was intended to create the impression that the truck had an official escort. AER 7, 108-109.

At approximately 8:05 a.m., Deputies Darling and Repcik stopped the CBR vehicles, which were still circling the perimeter street. App. 7a. The deputies told Plaintiffs that their vehicles were "scaring the kids," and that they were causing a disturbance at the school. AER 8, 35, 36, 52, 117, 126; App. 7a.

This was a unique situation which the deputies had never before confronted. App. 8a. As such, the deputies sought the assistance of their supervisor. App. 8a. They asked Defendant and Petitioner Sergeant Xavier Aguilar, the Field and Watch Sergeant on March 24, 2003, to respond to the scene. App. 7a, 8a. Sgt. Aguilar arrived about 30 minutes after the Plaintiffs were initially pulled over. App. 7a-8a.

While they were waiting for the sergeant, Kulas was free to walk around the general area, to talk to Padberg, to obtain a notepad and take notes, and to call his boss. AER 9, 37, 38, 40; App. 7a. Padberg freely sat on a retaining wall near the sidewalk. AER 10, 65-66; App. 7a. At no point did any deputy ever draw their gun. App. 7a. At no point were either Kulas or Padberg handcuffed. App. 7a. At no point were the Plaintiffs told that they were under arrest, nor were they ever placed in a patrol car. AER 10, 36, 64.

Defendant and Petitioner Deputy Dave Despot also responded to the scene. App. 8a. Deputy Despot is the school deputy for the Lomita Sheriff's Station and serves as the liaison between the LASD and Dodson Middle School. AER 11, 142-143; App. 8a. Despot

arrived about 15 minutes after Sgt. Aguilar. App. 8a. As part of the investigation, Sgt. Aguilar asked Deputy Despot to go to the school and contact the caller to clarify the situation. AER 11, 136.

Despot went to the school and asked Roberts to come to the scene to explain the situation and the disturbance created at the school. AER 11, 145; App. 8a. Kulas recalls that Roberts arrived approximately one hour after the initial stop. AER 12, 45. Roberts explained to Plaintiffs that their presence was disruptive to the school and its students. App. 40a. Plaintiffs were read and advised of California Penal Code § 626.8, pertaining to disrupting a school. App. 40a. Plaintiffs were then instructed to leave the school area, and not to return with the trucks causing the disturbance. AER 12, 44-47, 71, 102; App. 8a. Plaintiffs left the school area without incident. App. 40a.

The video on the CBR security vehicle shows that Plaintiffs were stopped at approximately 8:05 a.m., and left at approximately 9:20 a.m. App. 7a, 8a. They were detained for approximately 75 minutes. App. 7a, 8a.

Before the March 24, 2003 incident, Plaintiff Kulas had personally been to 50 schools in Los Angeles and Orange Counties as part of CBR's educational program. AER 14, 28-29. While Plaintiffs were told not to return to Dodson with the trucks, Plaintiffs were never told that they could not go to any school with the CBR trucks. AER 12, 14, 44-47; 49, 71, 102.) Plaintiffs were also never told that they would be cited with Penal Code § 626.8 if they ever went to another school. AER 14, 49.

In fact, on March 25, 2003, Plaintiff Kulas went to two or possibly three high schools in Burbank and Long Beach, California with the CBR trucks. AER 14, 47-48. Kulas had no contact with the LASD following the March 24, 2003 incident. AER 14, 50.

## II. PROCEDURAL HISTORY

Plaintiffs filed suit in the United States District Court, Central District of California under 42 U.S.C. § 1983 alleging a violation of their First and Fourth Amendment rights. App. 55a-75a. Plaintiffs sued the LASD, Sheriff Leroy Baca, Sgt. Aguilar, Deputy Darling, Deputy Repcik, Deputy Despot, and Art Roberts. App. 55a. Plaintiffs also sought injunctive relief. App. 57a.

All Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b). App. 40a. The district court held that the deputy defendants were entitled to qualified immunity, and dismissed the deputies and Sheriff Baca (who was sued only in his official capacity) as redundant of the LASD. App. 41a. The district court also denied Plaintiffs' request for a preliminary injunction. App. 41a. Plaintiffs appealed the ruling on the preliminary injunction, which was affirmed by the Ninth Circuit. App. 41a.

Following discovery, all parties moved for summary judgment. The court granted summary judgment to both the LASD Defendants and to Roberts. App. 39a-54a. The district court held that there had been no violation of the Plaintiffs' First Amendment rights as the Plaintiffs were in violation of California Penal Code § 626.8 by causing a substantial disruption at the

school in violation of California Education Code §§ 44811 and 32210. App. 42a-44a. The district court also found that there had been no violation of the Plaintiffs' Fourth Amendment rights as the stop had been justified by reasonable suspicion created by the 911 call made by the school. App. 49a. The district court also found that the length of the detention was reasonable as a matter of law as the deputies took reasonable action in a minimally intrusive manner. App. 49a-50a.

Plaintiffs appealed to the Ninth Circuit. App. 9a. In a published decision, the Ninth Circuit affirmed in part and reversed in part. App. 4a. The Ninth Circuit held that the deputies had violated the Plaintiffs' First Amendment rights because they restricted Plaintiffs' speech solely because of the children's reaction. App. 16a, 25a. Applying the law banning the heckler's veto, the court held that there is "no precedent for a minors' exception to the prohibition on banning speech because of listeners' reaction to its content." App. 17a. Thus, the Ninth Circuit held that under California's school disruption statute, Penal Code § 626.8, speech can only be limited at schools when the disruption is caused by the **manner** of the speech. App. 24a.

The court did admit that there was no case law on the issue, and that the application of California Penal Code § 626.8 in this instance was not clearly established. App. 26a-27a. As such, the court agreed that the deputies were entitled to qualified immunity as to the First Amendment claims. App. 27a.

The Ninth Circuit found, however, that the deputies were liable under the Fourth Amendment.

App. 28a. Despite the court's admission that there was no case law on the issue, and that the application of Penal Code § 626.8 was uncertain in this circumstance, the court found that the deputies had violated the Fourth Amendment by way of an unreasonably lengthy detention. App. 28a. The Ninth Circuit found that the deputies' request that their supervisor and the school administrator come to the scene to assist them with their investigation unreasonably delayed the stop in violation of the Fourth Amendment. App. 31a. The court also denied the deputies qualified immunity and held that even though this was a "novel" situation, the deputies purported lack of knowledge regarding the law was not sufficient excuse for the delay. App. 18a, 36a.

The court also remanded the case for consideration of the propriety of Plaintiffs' claim for injunctive relief, and for trial on Plaintiffs' claims for conspiracy and an unlawful search. App. 38a.

## REASONS FOR GRANTING CERTIORARI

In *Tinker v. Des Moines Independent Comm. Sch. Dist.*, 393 U.S. 503, 511 (1969) and *Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972), this Court established that the First Amendment applies differently at schools and that government may restrict speech that substantially interferes with school order. Schools also may consider the maturity, age, and reaction of the youth audience in determining the content of speech that is appropriate for its students and the school environment. *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

On the other hand, this Court has also stated that speech generally cannot be restricted solely because listeners have a negative reaction ("the heckler's veto"). *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). A listener's reaction to speech is generally not a content-neutral basis for regulation that can be upheld under the First Amendment. *Id.*

In this case, these two principles collide. In a published decision, the Ninth Circuit has found that the ban on the heckler's veto overrides any concerns regarding the sanctity of the school environment. The Ninth Circuit has ruled that government cannot restrict speech based on listener reaction, even when the listeners are children in a school which is being disrupted by the speech:

> There is, however, no precedent for a "minors" exception to the prohibition on banning speech because of listeners' reaction to its content. It would therefore be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children. App. 17a, 18a.

This case raises important federal questions under the First and Fourth Amendments regarding the ability of school and law enforcement officials to prevent and control speech directed at middle school students when the speech causes a substantial disturbance. In its published opinion, the Ninth Circuit has created new law that is inconsistent with other relevant Supreme Court decisions by holding that speech cannot be limited at schools — even where

there is a substantial disruption — unless the disruption is caused by the **manner** of the speech. Petitioners submit that the Ninth Circuit's extension of the heckler's veto principles to school children creates dangerous precedent that must be addressed by this Court as it substantially limits the power of government to protect the school environment.

This case also raises an important federal question regarding the ability of law enforcement officers to investigate in situations where the application of the law to a particular circumstance is unclear. Even though the Ninth Circuit acknowledged that there was no case law to guide the officers in this case, and that the situation was "novel," the Ninth Circuit found that the deputies' request that their supervisor and the school administrator come to the scene to assist the deputies with their investigation of the disruption call unreasonably delayed the stop in violation of the Fourth Amendment. App. 18a, 31a, 36a. The court held that even though the law was unclear, an officer's uncertainty about the law could not serve as an excuse. App. 31a.

This ruling is inconsistent with established qualified immunity principles. The Ninth Circuit's decision allows no room for officers to investigate, no room for officers to seek clarification in justifiably unclear situations, and no room for reasonable error on the part of police officers. Where even the Ninth Circuit admits that the law was unclear, and that there was no case law to guide the officers, qualified immunity should shield the officers from liability for taking the time to investigate. To hold otherwise would

create dangerous precedent and will only serve to discourage police officers from doing their jobs.

## LEGAL ARGUMENT

### I. THE RIGHT OF GOVERNMENT TO MAINTAIN A PEACEFUL SCHOOL ENVIRONMENT NEEDS TO BE RECONCILED WITH THE BAN ON THE HECKLER'S VETO.

Initially, the Ninth Circuit held that this case involved a content-based heckler's veto. Petitioners do not concede that point, as will be discussed below. However, even if Petitioners' actions were content-based restrictions, they are justified under the First Amendment.

#### A. A "School Exception" to the Ban on the Heckler's Veto Is Consistent with this Court's Mandate Regarding First Amendment Rights In and Around Schools.

This Court has established that the school setting demands a special approach to First Amendment disputes. The First Amendment rights applicable to schools "are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment." *Hazelwood,* 484 U.S. at 266 (1988).

> A school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which

> might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with 'the shared values of a civilized social order..."

*Id.* at 272. The nature of First Amendment rights within the schoolhouse gate is what is appropriate for children in school. *Vernonia Sch. Dist.47J v. Acton*, 515 U.S. 646, 656 (1995).

Historically, these principles arise in the context of student speech in schools. This case is unique in that it involves adult speech directed at a child audience in a school. There is scarce case law in this context and this case presents the Court with a much-needed opportunity to resolve the issue. Applying the law established by this Court regarding First Amendment rights in schools and the law established by this Court regarding speech directed at children, Petitioners submit that speech may be restricted at schools — whether the speech is made by adults or children — so long as the speech causes a substantial disruption to the school environment.

### 1. Government should not have to tolerate substantial disruption in schools — no matter what manner of speech creates it.

Government has the power to protect students from diversions which disturb the "peace and good order" of the school environment. See *Grayned v. City of Rockford* 408 U.S. 104, 119 (1972). The Ninth Circuit has held that schools have the **duty to prevent** disturbances. *Lavine v. Blaine School Dist.*, 257 F.3d 981, 989 (9th Cir. 2001) (no First Amendment violation when school expelled student for writing poem describing his shooting other students). Educators have substantial deference as to what speech is appropriate at schools. *Id.* at 988. "The daily administration of public education is committed to school officials...[t]hat responsibility carries with it the inherent authority to prescribe and control conduct in the schools." *Id.* citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

A "proper" educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be permissible in a non-school setting. See *Vernonia*, 515 U.S. at 655. For many purposes, school authorities "act *in loco parentis* ... with the 'power and indeed the duty to inculcate the habits and manners of civility.'" *Id.* at 656. Thus, while First Amendment rights are not shed at the schoolhouse gate, the nature of those rights is what is appropriate for children in school. *Id.* at 656. This duty exists under both federal and California law. See *M.W. v. Panama Buena Vista Union School Dist.*, 110 Cal.App.4th 508, 516-517 (2003) (special

relationship formed between school and students resulting in affirmative duty on school to take all reasonable steps to protect students)

This Court has established that schools should not have to tolerate speech which causes a "substantial disruption." Speech at schools may be suppressed when school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 511. In *Tinker*, the Court upheld the right of students to wear anti-war armbands as there was no evidence of a substantial disruption. *Id.* However, *Tinker* made clear that where such disruption exists, the school may act to stop the disturbance. *Id.*

This principle also extends to speech in the immediate vicinity of schools. In *Grayned v. City of Rockford*, 408 U.S. at 118-120, this Court held that speech may be limited in and around schools where it materially disrupts the classroom. *Id.* at 118. In *Grayned*, this Court upheld an anti-picketing and anti-noise ordinance that applied to areas in the immediate vicinity of schools. *Id.* at 118-119, n. 39. This Court logically reasoned that speech immediately around schools may have an effect in the school, and government must be empowered to prevent any such disturbance:

> [I]t would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. On the other hand, schools could hardly tolerate boisterous demonstrators who drown out

> classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. *Id.* at 119

This case presents that unusual situation where the trucks did cause a substantial disruption causing some middle school children to cry, some children to go home, and some children to plan a violent act directed at the trucks. Even assuming that the manner in which the speech was presented — a large truck with huge photographs — may not have been in and of itself disruptive, the disruption caused by the Plaintiffs to the children and to the school was real, material, and substantial.

The Ninth Circuit's ruling instructs schools and the police officers tasked with assisting schools that in these situations, they should not and cannot respond to the disruption — unless the **manner** of the speech is disruptive. This ruling is inconsistent with all of this Court's prior law establishing government's ability to stop substantial disruption at schools. Government should not have to tolerate substantial disruption at schools — no matter what manner of speech creates it.

### 2. Government can control speech at schools so long as the restrictions are reasonably related to legitimate pedagogical concerns.

In addition to preventing substantial disruptions, this Court has established that government is also empowered to control speech at schools so long as the restrictions are reasonably related to "legitimate pedagogical concerns." In *Bethel School Dist. No. 403*

*v. Fraser*, 478 U.S. 675, 682 (1986), this Court held that the school district was within its permissible authority when it suspended a high school student for using a graphic and sexual metaphor during an assembly. *Id.* This Court noted that school boards have the authority to determine what speech is appropriate for the classroom. *Id.* at 683.

Similarly, in *Hazelwood v. Kuhlmeier*, this Court found that a high school could restrict speech regarding sexual activity as the restriction was reasonably related to legitimate pedagogical concerns. *Hazelwood*, 484 U.S. at 273. Thus, the school's choice not to publish certain articles regarding student pregnancy and the impact of divorce in the high school newspaper did not violate the First Amendment as the restrictions were made out of legitimate concern for the students. *Id.*

Last year, this Court issued its most recent opinion on school speech in which it affirmed that schools can prohibit speech that can be perceived to advocate drug use. *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2622 (2007). In *Morse*, this Court held that a school administrator did not violate the First Amendment when she suspended a student after he refused to take down a banner stating "Bong Hits 4 Jesus" at an off-campus school event. *Id.*; see also *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (school can ban ads in school publications for Planned Parenthood).

In *Morse*, this Court noted that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or a "mere desire

to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Morse,* 127 S.Ct. at 2629. However, where the danger created by the speech is serious and palpable, the school may impose speech restrictions. *Id.*

Petitioners submit that the danger in this case was real and serious, and therefore justified the restriction. The Ninth Circuit does not even mention the *Morse* case in its opinion, but clearly, the effect of the Ninth Circuit's opinion will be that unless that real and serious danger is caused by the manner of the speech, the danger is irrelevant.

In this case, the evidence showed that the presence of the CBR vehicles caused some middle school children to not go to their classrooms and caused some children to become upset and cry. App. 6a, 7a, 43a. It caused several boys to become so outraged that they indicated they were going to get rocks from a construction area near the school to throw at the truck. App. 6a, 7a, 43a. The trucks also caused traffic disruption and concerns regarding the safety of the children arriving at school. App. 6a. Moreover, CBR's Executive Director has acknowledged that he has seen students "faint," "become physically ill," "weep," "avert their gaze," and leave the location in response to the photographs. App. 5a.

Where students, particularly young children, have this reaction to an event, government should be entitled to act out of a legitimate pedagogical concern. This is particularly true where children are a captive audience, as in this case. This discretion should not be

limited by whether the manner or the content of the speech causes the pedagogical problem.

### 3. Different First Amendment considerations apply to adult speech if the speech reaches an audience of children.

In addition to the special rules for schools, there are special First Amendment considerations when it comes to children audiences. This Court has acknowledged that First Amendment standards can be specially tailored to protect children. For example, in *United States v. American Library Association*, 539 U.S. 194, 199 (2003), this Court held that public libraries could use filtering software to block sexually explicit or otherwise problematic images that are "harmful" to minors. In *Ginsberg v. New York*, 390 U.S. 629 (1968), this Court also upheld a New York statute banning the sale of sexually oriented materials to minors.

The Ninth Circuit's ruling does not allow for any discretion related to the age of the audience. Petitioners acknowledge that CBR's display might not have caused a similar reaction at a high school, or perhaps even at a different middle school. However, in this case, CBR's display did in fact cause a substantial disruption to the school environment. Given the precedent for protecting both the school environment, and children audiences, government should be permitted to respond. As such, the Ninth Circuit's ruling is problematic and should not stand.

### B. The Ninth Circuit's Focus on the Manner of the Speech as the Only Determinative Factor to Justify Speech Restrictions at Schools Is Impractical and Inconsistent with Legal Precedent.

The Ninth Circuit's focus on the manner of the speech as the determinative factor to justify speech restrictions is impractical and inconsistent with the legal precedent discussed above. For example, in terms of the manner of the speech, there is no real difference between the armband in *Tinker* and the paper containing the article in *Bethel* or the banner in *Morse*. See also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (prohibiting student from wearing t-shirt condemning homosexuality did not violate First Amendment); *Scott v. School Bd.*, 324 F.3d 1246, 1248 (11th Cir. 2003) (ban on confederate flag upheld); *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 (9th Cir. 2000) (removing homophobic materials from school bulletin board did not violate First Amendment because tolerance was legitimate pedagogical concern).

What is different, and significant, is the disturbance caused by these different speech media, and the administrators' perceived disruption to the school environment. In this case, the Ninth Circuit held that so long as the manner in which CBR expressed itself was not itself disruptive, the disruption caused by the display is simply irrelevant. However, Petitioners submit that under this Court's precedent, a substantial disruption is more significant than either the manner or the content of the speech. So long as there is substantial disruption at the school, government should be able to act.

School officials are in the best position to decide what speech is appropriate for its student population, and law enforcement officials should be entitled to rely on the representations made by school officials in assisting them in this endeavor. No one can dispute that the First Amendment applies in and around schools; however, where such speech substantially disrupts the school environment, government must be allowed to respond.

The test created by the Ninth Circuit in its ruling does not give government this discretion, and in fact, places government officials in an impossible situation. In the face of disruption, there is law saying that officials must act, no matter what the cause of the disruption may be. *Epperson*, 393 U.S. at 104; *Lavine*, 257 F.3d at 989. On the other hand, the Ninth Circuit's ruling says that unless the disruption is caused by the manner of speech, officials cannot act or they will face civil rights liability. This Court must provide guidance to schools and law enforcement.

Moreover, the Ninth Circuit's holding that officials may restrict speech only if the **manner** of speech causes a disturbance is wholly impractical. The Ninth Circuit held that CBR's display was constitutionally permissible — despite the substantial disruption caused — because the message was conveyed through silent photographs on a circling truck. However, under the Ninth Circuit's reasoning, if an individual on the same street by Dodson Middle School had been yelling or screaming, and the same exact disruption had resulted, officials could have lawfully stopped the disturbance and there would have been no First

Amendment violation. This distinction defies reason, and necessitates this Court's review.

### C. Petitioners Imposed a Reasonable Time, Place, and Manner Restriction on CBR's Speech.

Instead, Petitioners imposed a reasonable time, place, and manner restriction on the Plaintiffs' speech. Like many other states, California recognizes a compelling interest in having an undisrupted school session, and in protecting students from diversions which disturb the "peace and good order" of the school environment. See *Rodriguez v. Inglewood Unified School Dist.*, 186 Cal.App.3d 707, 715 (1986); see also Cal. Const. art. I, § 28(c) (students have inalienable right to attend safe, secure, and peaceful campuses); Cal. Educ. Code § 32212 (advising schools to address the problem of classroom interruptions).

Consequently, California has enacted several statutes intended to protect schools and their students. See e.g. Educ. Code § 32210 (Willful Disturbance at Public School); Educ. Code § 32211 (Threatened Disruption or Interference With Classes); Educ. Code § 44810 (Willful Interference with Classroom Conduct); Educ. Code § 44811 (Disruption or Disorder); Penal Code § 626.7 (Failure to Obey Direction to Leave Campus); Penal Code § 626.8 (Disruptive Entry Upon School Grounds); Penal Code § 653g (Loitering Around School); Penal Code § 415.5 (Disturbances On Schools).

In this case, Kulas and Padberg were instructed not to return with the trucks or they might be cited with a violation of California Penal Code § 626.8. AER 12, 44-

47, 71, 102; App. 8a. Section 626.8 provides that it is a misdemeanor for a person without lawful business to remain on, or return to school property (or the public ways adjacent thereto) within 7 days of being informed by a school or law enforcement official that the person is causing a disturbance at the school. Kulas and Padberg were without lawful business as defined in section 626.8(c)(2) and were not engaged in a lawful exercise of free speech as they were causing a disturbance in violation of Education Code §§ 32210 and 44811.[3]

The Ninth Circuit held that because the manner in which the CBR Plaintiffs were exercising their First Amendment rights was not in and of itself disruptive, Penal Code § 626.8 could not have applied despite the actual disturbance created at Dodson Middle School because the disturbance was caused by the reaction to the speech. As discussed above, this distinction is not supported by the law or simple reason.

Government may impose content-neutral time, manner, and place restrictions on speech that serve a significant government interest, are narrowly tailored to advance that interest, and leave open alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). In this case, the restriction on CBR's speech was a valid content-neutral time, place, and manner restriction. There was no evidence that Petitioners asked Kulas and Padberg to leave the school vicinity because of hostility toward

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[3] California Education Code §§ 32210 and 44811 make it a misdemeanor to willfully disturb and materially disrupt a school.

the content of the CBR message. The evidence showed that the deputies' actions were motivated solely by the disruption at the school. In fact, the CBR Plaintiffs admitted that they had been to several schools in Los Angeles County both before and after Dodson Middle School without incident. The restriction in this case was motivated only by the disturbance caused at Dodson.

Petitioners' actions were also lawful because they were done to serve a significant government interest. This Court has recognized a compelling government interest in having an undisrupted school session. *Grayned,* 408 U.S. at 119. In fact, government has few interests more compelling that its interest is insuring that children receive an adequate education. *PETA v. Rasmussen*, 298 F.3d 1198, 1205 (7th Cir. 2002).

Petitioners' restrictions were also narrowly tailored to advance this compelling interest, and left open alternate channels of communication. Kulas and Padberg were told only to leave the Dodson school area. They were not prohibited from driving their vehicles on other public streets around Dodson or from going to other schools. Petitioners' actions were reasonable time, place, and manner restrictions designed to stop a substantial disruption at Dodson. Should the Ninth Circuit's ruling stand, the ability of government officials to impose reasonable time, place, and manner restrictions designed to protect the sanctity of the school environment will be severely hindered. This Court should clarify what ability government has in these circumstances.

## II. POLICE OFFICERS SHOULD BE ENTITLED TO QUALIFIED IMMUNITY FOR THE TIME INVESTIGATING WHEN EVEN THE CIRCUIT COURT OF APPEALS FINDS THAT THE LAW WAS UNCLEAR AND THAT THE CIRCUMSTANCES THE OFFICERS FACED WERE NOVEL.

This case also raises an important federal question under the Fourth Amendment. Despite its acknowledgment that there was no case law on Penal Code § 626.8 to guide the deputies, and that the circumstances presented to the deputies were "novel," the Ninth Circuit held that the deputies were liable under the Fourth Amendment. The court held that the deputies' uncertainty about the law in this situation could not excuse the 75-minute detention during which they sought the advice of their supervisor and the presence of a school administrator. App. 31a. This holding, given the circumstances presented in this case, radically deviates from established Fourth Amendment law and qualified immunity principles.

The critical goal of qualified immunity is to avoid excessive disruption of government. *Saucier v. Katz*, 533 U.S. 194, 202 (2001). In our litigious culture, "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court adopted a three-part inquiry to determine the

application of qualified immunity: (1) Did the officer's conduct violate a constitutional right? (2) Was that right clearly established? (3) And did the officer make a reasonable mistake regarding his/her conduct? *Id.* at 201-205.

Where a reasonable officer could not have known that his or her conduct was unlawful, the officer is entitled to qualified immunity. *Id.* at 202. Qualified immunity is sweeping in scope and designed to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Fourth Amendment jurisprudence grants police officers a certain amount of leeway to conduct an investigation and recognizes that it takes officers time to do so. Case law imposes no rigid time limitations on investigative stops and there is no bright line for determining when an investigatory stop becomes an arrest. *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002), citing *Texas v. Brown*, 460 U.S. 730, 739 (1983). Evaluating the length of a detention requires consideration of all the circumstances surrounding the encounter, including how intrusive the stop was, and also whether the methods the police used were reasonable under the circumstances. *Id.*, citing *Florida v. Bostick*, 501 U.S. 429, 439 (1991) "Common sense and ordinary human experience must govern over rigid criteria." *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

The Fourth Amendment does not require a police officer who lacks the precise information necessary for probable cause to arrest to simply shrug his/her

shoulders and allow a crime to occur or a criminal to escape. *Adams v. Williams*, 407 U.S. 143, 145 (1972). The whole point of an investigatory stop is to allow the police to investigate. *Gallegos*, 308 F.3d at 991-992.

### A. Qualified Immunity Should Protect an Officer's Attempt to Investigate and Apply an Unclear Law.

In finding the deputies liable for the length of the detention in this case, the Ninth Circuit cited case law holding that uncertainty regarding the law cannot justify a detention. App. 31a. To hold otherwise, the court stated, would remove any incentive for officers to make certain that they understand the law. App. 31a. In situations where the law is clear, Petitioners might agree.

However, the situation in this case was not typical — by the Ninth Circuit's own admission. The Ninth Circuit acknowledged that there was no law to guide the deputies regarding the application of Penal Code § 626.8, and that there was no case law regarding whether the school's right to protect the students trumps the Plaintiffs' First Amendment rights. App. 26a, 27a.

While police officers are expected to know the law, officers are not required to have the kind of legal scholarship normally associated with law professors and academics. *Ward v. San Diego County*, 791 F.2d 1329, 1332 (9th Cir. 1986). Where the law is undeveloped, police officers cannot be expected to

predict the future course of constitutional law.[4] *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Instead, a "reasonable person" standard applies. *Ward*, 791 F.2d at 1332.

In this case, Petitioners submit that qualified immunity should be extended to officers who take the time to investigate situations where the law is unclear. The deputies should not have been held to knowledge which the Ninth Circuit determined that they reasonably did not have. The deputies were confronted with a novel situation. They sought assistance from their supervisor and clarification from the victim (the School). Their investigation was conducted in a manner that was minimally intrusive toward Kulas and Padberg. This is not the conduct of "plainly incompetent" officers, or officers who are knowingly violating the law. See *Malley*, 475 U.S. at 341. The deputies' conduct in this case was reasonable under the circumstances. It is patently unfair to subject the deputies to money damages for trying to do the right thing.

Indeed, to let the Ninth Circuit's ruling stand, would effectively discourage police officers from investigating, and creates dangerous precedent. The

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[4] Notably, it took the Ninth Circuit over a year from oral argument to issue its ruling in this matter. Oral argument in the Ninth Circuit took almost one hour, and oral argument in the district court was similar in time. It is indeed ironic that the Ninth Circuit faults the deputies for not knowing exactly what to do in the 75 minutes of this incident. The officers should not be punished for seeking their supervisor's and the school's assistance.

court's ruling allows no room for officers to investigate, no room for officers to seek clarification in justifiably unclear situations, and no room for reasonable error on the part of police officers. Where even the Ninth Circuit admits that the law was unclear, qualified immunity should shield the officers from liability for taking the time to investigate.

### B. The Ninth Circuit's Ruling Contradicts its Own Precedent, and That of Other Circuits Regarding the Reasonable Length of a Detention.

Finally, the Ninth Circuit's holding is problematic in that it conflicts not only with its own precedent, but with the law in the other circuits regarding what is permissible for a detention. In *Gallegos v. City of Los Angeles*, 308 F.3d at 992, the Ninth Circuit held that a 45-60 minute detention was reasonable as a matter of law while the officers investigated the crime and waited for a supervisor to arrive to assist them with their investigation — especially since the suspects (as in this case) were neither handcuffed, nor in their patrol car the whole time. Similarly, the Ninth Circuit has acknowledged that reasonable investigations may require a need to consult with outside sources. *Id.; United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1995) (detention for over one hour was reasonable given need to confirm information with FAA and totality of circumstances); *United States v. Hodoyan-Palacios*, 993 F.Supp. 789, 792 (S.D. Cal. 1998) (detention lasting over two hours reasonable given need to obtain information from outside sources). In this case, the Ninth Circuit did not even acknowledge this cited precedent. At a minimum,

these cases could have given the deputies in this case reason to believe that their conduct was lawful under the qualified immunity analysis.

Moreover, the Ninth Circuit's ruling in this case creates a conflict with other circuits regarding the discretion afforded to officers to conduct investigations. See *United States v. McCarthy*, 77 F.3d 522 (1st Cir. 1996) (75 minute detention to conduct investigation reasonable where no evidence of less than diligent behavior of officers); *United States v. Frost*, 999 F.2d 737 (3d Cir. 1993) (90 minute detention to wait for dog for sniff test reasonable); *United States v. White*, 42 F.3d 457 (8th Cir. 1994) (80 minute detention to wait for dog for sniff test reasonable); *United States v. Rutherford*, 824 F.2d 831, 833-834 (10th Cir. 1987) (one-hour traffic stop reasonable where there were problems with police computer).

In *United States v. Sharpe*, 470 U.S. at 686-687, this Court noted:

> A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished ... The question is not simply whether some alternative was available, but whether the police acted unreasonably in failing to recognize or pursue it.

In this case, the deputies acted reasonably and diligently under the circumstances they confronted. While Petitioners deny that a Fourth Amendment violation occurred — at a minimum, they should have

been entitled to qualified immunity for the length of their investigation under the Fourth Amendment given that even the Ninth Circuit itself admitted that the law was unclear.

Police officers are entitled to know what they are allowed to do in an investigation and what they can and cannot do when they face circumstances where the answers are not clear. The Ninth Circuit's ruling appears to require police officers to hold law degrees and crystal balls in order to avoid civil liability. Petitioners ask that this Court step in to clarify that this is not the case.

## CONCLUSION

For the foregoing reasons, Respondents ask that this Court grant the instant petition for a writ of certiorari.

DATED: September 30 , 2008

Respectfully submitted,

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# APPENDIX A

## FOR PUBLICATION

## UNITED STATES COURT OF APPEALS
## FOR THE NINTH CIRCUIT

**No. 05-55294**
**D.C. No. CV-03-00386-GLT**

**Filed July 2, 2008**

CENTER FOR BIO-ETHICAL REFORM, INC.; PAUL KULAS; THOMAS PADBERG,
*Plaintiffs-Appellants,*

v.

LOS ANGELES COUNTY SHERIFF DEPARTMENT; LEROY D. BACA, in his official capacity as Sheriff; XAVIER R. AGUILAR, individually; XAVIER R. AGUILAR, in his official capacity as Sergeant; DAVE DESPOT, individually; DAVE DESPOT, in his official capacity as Deputy; MARK DARLING, OPINION individually; MARK DARLING, in his official capacity as Deputy; MARK C. REPCIK, individually; MARK C. REPCIK, in his official capacity as

Deputy; ART ROBERTS, individually; ART ROBERTS, in his official capacity as an administrative official, Dodson Middle School,
*Defendants-Appellees.*

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

Argued and Submitted
February 12, 2007—Pasadena, California

Before: Harry Pregerson, William A. Fletcher, and Marsha S. Berzon, Circuit Judges.

Opinion by Judge Pregerson

## COUNSEL

Robert J. Muise (argued), Thomas More Law Center, Ann Arbor, Michigan; James A. Hayes, Cummins & White LLP, Newport Beach, California, for the plaintiffs-appellants.

Jennifer A.D. Lehman (argued), Deputy County Counsel, Raymond G. Fortner, County Counsel, Los Angeles, California, for defendants-appellees Los Angeles County Sheriff's Department.

Julie Mullane (argued), Gary Robert Gibeaut, Nancy Mahan-Lamb, Lisa J. Brown, Gibeaut, Mahan &

Briscoe, Los Angeles, California, for defendant-appellee Art Roberts.

## OPINION

PREGERSON, Circuit Judge:

Plaintiffs drove a truck that displayed enlarged, graphic photographs of early-term aborted fetuses around the perimeter of a public middle school in Rancho Palos Verdes, California. Deputy Sheriffs were dispatched to the school. Plaintiffs contend that the officers violated their First Amendment rights by ordering Plaintiffs to remove their truck from an area adjacent to the school. Plaintiffs also contend that the officers violated their Fourth Amendment rights by detaining Plaintiffs for an unreasonable time and by searching their vehicle without consent.

Plaintiffs brought this action under 42 U.S.C. § 1983 seeking damages and injunctive and declaratory relief for violation of their First and Fourth Amendment rights. The district court held that the Deputy Sheriffs and Dodson Middle School Assistant Principal Art Roberts were entitled to qualified immunity and dismissed the damages claims against them. In addition, the court dismissed the lawsuit against Los Angeles County Sheriff Leroy D. Baca, a redundant defendant. After considering cross-motions for summary judgment, the district court granted summary judgment in favor of Defendants on the remaining First and Fourth Amendment claims. Plaintiffs timely appealed these orders.

We have jurisdiction under 28 U.S.C. § 1291. For the reasons set forth below, we reverse the district court's orders (1) granting Defendants' summary judgment motion on all the issues in the case, and (2) denying Plaintiffs' summary judgment motion with respect to Plaintiffs' First Amendment claim and Fourth Amendment Claim for unreasonable detention. We affirm the district court's order (1) dismissing Sheriff Leroy D. Baca and (2) granting qualified immunity to the individual defendants on the First Amendment claim. We remand for the district court to resolve Plaintiffs' conspiracy claim and request for injunctive relief.

## I. BACKGROUND

### A. Facts

Plaintiff Center for Bio-Ethical Reform (Bio-Ethical Reform) is a non-profit organization whose main purpose is to promote "prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative educational programs." One of the educational programs is called the "Reproductive Choice Campaign." With this campaign, Bio-Ethical Reform seeks to "expose as many people as possible to the reality of abortion" by displaying large, graphic photographs of first-term aborted fetuses on the sides of trucks. The trucks often drive on surface streets and freeways, but Bio-Ethical Reform employees and volunteers sometimes take the trucks to specified places to target particular audiences.

Middle school and high school students are a common target audience. Bio-Ethical Reform conducts its campaign at such schools because it believes its message will discourage teenage abortions. Bio-Ethical Reform also believes that "students who are old enough to have an abortion are old enough to see one." Bio-Ethical Reform personnel arrive at the start of the academic day so that students will see Bio-Ethical Reforms's enlarged photographic images of first-term aborted fetuses as they arrive for school.

Gregg Cunningham, Bio-Ethical Reform's Executive Director, acknowledged in his deposition that he has seen students "faint," "become physically ill," "weep," "avert their gaze," and "leave the room" in response to these pictures. Cunningham said that the "typical" reaction is disbelief. He defended Bio-Ethical Reform's display of aborted fetuses, saying that "[s]tudents are routinely exposed to disturbing images, whether it's airlines exploding into skyscrapers or choose your atrocity." Cunningham also asserted that exposing children to such pictures is the best way to teach them about the ethical issues involving abortion: "you can't teach inexpressively horrific historical fact in exclusive reliance on the written or spoken word. Teachers who teach about racial injustice use pictures of black people being beaten to their knees for trying to register to vote."

On March 24, 2003, Plaintiffs Paul Kulas, a Bio-Ethical Reform employee, and Thomas Padberg, a Bio-Ethical Reform volunteer, drove to Dodson Middle School in Rancho Palos Verdes, California. Kulas drove a truck that displayed the photographic images of aborted fetuses and Padberg drove an escort "security

vehicle." The security vehicle was a white Ford Crown Victoria sedan equipped with a security cage, red-and-amber flashing lights, push bars, and antennae mounted on the roof. The two men arrived at the school at about 7:30 a.m. — about thirty minutes before classes began. They then drove on public streets around the perimeter of the school.

Plaintiffs' graphic display quickly caused concern among school officials. Defendant Art Roberts, an assistant principal at Dodson Middle School, identified traffic as one of his primary concerns. According to him, 85 to 95 percent of Dodson's 2000 students arrive by bus or car between 7:15 a.m. and 8:00 a.m. The students' arrival causes "heavy traffic" around the school. This traffic can become a safety hazard when drivers or pedestrians become upset, angry, or distracted. At a preliminary hearing, Roberts testified that during the time he had worked at Dodson Middle School, vehicles on streets around the school had struck five children and killed two.

On the day Plaintiffs were at Dodson Middle School, Assistant Principal Roberts observed some children stopping on the sidewalks and staring at the photographs of aborted fetuses, while others momentarily stood in the middle of the street. Faculty members also reported "abnormal" difficulty getting children onto the campus.

Assistant Principal Roberts identified additional concerns. He saw a number of children express anger over Plaintiffs' graphic display. He also overheard a group of boys planning to throw rocks at the truck. The group disbanded only after Roberts confronted them.

Assistant Principal Roberts observed two or three girls crying. He also said that at least one class spent time discussing the truck's displayed images of aborted fetuses. Nevertheless, Assistant Principal Roberts said the school had a "fairly normal opening" and that all students he could see were on the campus by the start of classes at 8:01 a.m.

School officials contacted the Sheriff's Department at about 7:50 a.m. The dispatcher sent a text message to Deputy Sheriffs Mark Darling and Mark Repcik, who were driving separate vehicles. The message stated that an "[a]nti-abortion truck with offensive language and pictures is circling the school and videotaping the school and surrounding area." The Sheriff's Department station desk also radioed Deputy Repcik and told him a "large white truck [was] driving [around] the middle school [with] very graphic pictures on the sides and [was] disrupting the school."

At 8:05 a.m., Deputy Sheriffs Darling and Repcik stopped Plaintiff Kulas, who was driving the display truck, and Plaintiff Padberg, who was driving the "security vehicle." According to Kulas, Deputy Darling told him that the Deputy Sheriffs stopped the two vehicles because they were "driving these pictures around the school with offensive language, and . . . scaring kids . . . ." During the stop, no Deputy Sheriff drew his gun or handcuffed Kulas or Padberg. The deputies allowed Kulas and Padberg to move freely about the immediate area and talk to each other for the duration of the stop.

Thirty minutes later, Deputy Sheriff Sergeant Xavier Aguilar arrived. According to Deputy Sheriffs

Darling and Repcik, they summoned Sergeant Aguilar, their supervisor, to the scene because they had never dealt with a comparable situation. Deputy Sheriff Dave Despot, the liaison to Dodson Middle School, was also summoned to the scene. He arrived between fifteen and thirty minutes after Aguilar arrived. Despot took photographs of the security vehicle and the truck. He then went into the school to speak with Assistant Principal Roberts.

At some point, Deputy Sheriff Darling entered the security vehicle to activate the switch for the flashing red-and-amber lights. Then, with Padberg's permission, Darling searched the vehicle for weapons. The record does not indicate whether there were two discrete searches or only one.

Eventually, Assistant Principal Roberts accompanied Deputy Despot back to the scene, and, after reading California Penal Code § 626.8 to Kulas and Padberg, told them that they must leave the area around the school. Kulas and Padberg promptly left the area at 9:20 a.m. Plaintiffs assert that, because of fear of arrest, they have taken their Reproductive Choice Campaign to only one other school in Los Angeles County since the March 24, 2003 incident.

**B. Procedural History**

Plaintiffs filed this 42 U.S.C. § 1983 suit on April 17, 2003. Their complaint seeks nominal damages from Assistant Principal Roberts, and from Deputy Sheriffs Repcik, Darling, Despot, and Sergeant Aguilar. Plaintiffs sought an injunction to restrain the four Deputy Sheriffs, Assistant Principal Roberts, Sheriff

Baca (in his official capacity), and the Los Angeles County Sheriff's Department from enforcing § 626.8 against Plaintiffs' abortion speech activities. Finally, Plaintiffs sought a declaration that § 626.8 is unconstitutional as applied to Plaintiffs' activities. Plaintiffs do not seek monetary damages from the Sheriff's Department.

The district court granted the individual defendants'[1] motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), holding that these defendants were entitled to qualified immunity.[2] The district court dismissed Sheriff Baca as a redundant defendant. On February 10, 2005, the district court granted summary judgment for all defendants and denied summary judgment for Plaintiffs. This timely appeal followed.

## II. STANDARD OF REVIEW

A district court's decision on cross-motions for summary judgment is reviewed de novo. *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006). Construing the evidence in the light most favorable to the nonmoving party, we must determine whether genuine issues of material fact exist. *Id.* When

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[1] The phrase "individual defendants," refers to the defendants sued in their individual capacity: Deputies Repcik, Darling and Despot, Sergeant Aguilar, and Assistant Principal Roberts.

[2] The district court did not specify whether qualified immunity applied only to the First Amendment claims or to all claims. The court declined to clarify the scope of its grant of immunity in the summary judgment order, instead holding that the issue was moot.

presented with cross-motions for summary judgment, we review each motion for summary judgment separately, giving the nonmoving party for each motion the benefit of all reasonable inferences. *Id.* at 790-91.

## III. FIRST AMENDMENT ISSUES

Plaintiffs contend that the application of § 626.8 under the circumstances presented here violated their First Amendment rights. We have serious concerns about the constitutionality of the statute as applied. We need not decide, however, whether the statute as applied is unconstitutional because we conclude that the California courts would construe the statute narrowly so as not to apply to Plaintiffs' conduct.

### A. Applicability of Penal Code § 626.8

#### *1. First Amendment concerns*

Plaintiffs sought to express their anti-abortion message on a public street, a traditional public forum. *See Frisby v. Schultz*, 487 U.S. 474, 481 (1988) ("[A]ll public streets are held in the public trust and are properly considered traditional public fora."); *see also PeTA v. Rasmussen*, 298 F.3d 1198, 1204 (10th Cir. 2002) (holding that the sidewalks near a public school are a traditional public forum). Generally, content-based speech restrictions in public fora are subject to strict scrutiny. *Flint v. Dennison*, 488 F.3d 816, 830 (9th Cir. 2007).

[1] The government may, however, impose reasonable "time, place, or manner" regulations on

speech in public fora, provided the regulations "are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). We therefore first address whether the application of § 626.8 to Plaintiffs' display of photographs of aborted fetuses outside Dodson Middle School would qualify as a content-neutral time, place, or manner regulation. We conclude that it is questionable whether the statute, if it applies to Plaintiffs' conduct in this case, would satisfy the first criterion — that it be "justified without reference to the content of the regulated speech." *Id.*

[2] We previously noted that a law "is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." *ACLU*, 466 F.3d at 793. Defendants argue that § 626.8 is content-neutral because it is justified by a purpose unrelated to the content of the message — namely, the "compelling interest in having an undisrupted school session conducive to the students' learning." *See Grayned v. City of Rockford*, 408 U.S. 104, 119 (1972).[3]

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[3] We note that in this case, unlike in *Grayned*, the school setting alone does not justify the restriction applied to Plaintiffs. *Grayned* identified disruptions of "normal school activities" as "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Grayned*, 408 U.S. at 118-19. Further

[3] The language of § 626.8 does not indicate an intent to suppress speech of a certain content. That lack of purpose, however, does not render application of the statute to Plaintiffs' speech content-neutral. If the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the "heckler's veto."[4] *See Bachellar v. Maryland*, 397 U.S. 564, 567 (1970) ("[I]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.") (quotation marks and citations omitted); *see also, e.g.*, *Gooding v. Wilson*, 405 U.S. 518, 527 (1972); *Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965); *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949). Thus, as the Supreme Court has made clear, the government cannot silence messages simply because they cause discomfort, fear, or even anger:

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emphasizing this focus on *classroom* interruption, *Grayned* noted with approval that the ordinance did not restrict "expressive activity before or after the school session, while the student/faculty 'audience' enters and leaves the school," *id.* at 120 — the precise situation presented here. The school setting here thus provides no authority to engage in otherwise impermissible restrictions.

[4] The term "heckler's veto" first appeared in a footnote in *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966). We use this term to describe restrictions on speech that stem from listeners' negative reactions to a particular message.

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . .

*Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

**[4]** The disruptions caused by the Plaintiffs' conduct were all a result of the students' reactions to Plaintiffs' message. Assistant Principal Roberts stated that he saw two or three girls cry and that he heard several angry boys discuss throwing rocks at Plaintiffs' truck. Roberts also stated that the faculty had more difficulty than normal getting children into classes. There is some evidence that students discussed Plaintiffs' display of images of first-term aborted fetuses during class time. Finally, the children did not go into the school as quickly as usual. Some students stopped in the street momentarily and stared at the truck, causing traffic congestion. These incidents were all reactions to the *message* displayed on Plaintiffs' truck.

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992), the Supreme Court emphasized that "[l]isteners' reaction to speech is not a content-neutral basis for regulation" — in other words, the

First Amendment does not permit a heckler's veto. *Forsyth County* struck down an ordinance as unconstitutionally content-based because the statute based parade fees on the estimated cost of maintaining public order during the event. Because the size of the fee "depend[ed] on the administrator's measure of the amount of hostility likely to be created by the speech based on its content," the ordinance unconstitutionally burdened speech that was "unpopular with bottle throwers." *Id.*

As the cases cited above indicate, *Forsyth County* was not the first or only case to hold that a regulation that depends upon listeners' reaction to speech is not a content-neutral regulation. In *Cox v. Louisiana*, for example, the Supreme Court held that police could not justify shutting down a civil rights demonstration on public sidewalks as a breach of the peace on the ground that there was a "fear of violence . . . based upon the reaction of the group of white citizens looking on from across the street." 379 U.S. at 550. Like *Forsyth County*, *Cox* rested on the premise that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Id.* at 551 (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

The venerable heckler's veto line of cases does not align perfectly with a standard this court has recently used to help determine whether a regulation is content-based: whether "a law enforcement officer must read a [communication's] message to determine

if the [communication] is exempted from the ordinance." *ACLU*, 466 F.3d at 795-96.[5]

**[5]** The "read the message" test, however, cannot encompass the universe of content-based statutes because the test does not fully account for the heckler's veto line of cases. Here, the government did not prospectively gauge the effect of the message (and ban it accordingly), but instead waited for, and then responded to, listeners' reactions. Whether prospectively, as in *Forsyth County*, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction.[6]

**[6]** To account for *Cox* and similar cases, our inquiry must focus on the reason for the government's restriction of speech. If *listeners* react to speech based on its content and the government then ratifies that reaction by restricting the speech *in response to listeners' objections*, then the restriction is content-based. *Cf. Ovadal v. City of Madison*, 469 F.3d 625, 630 (7th Cir. 2006) (holding that the removal of a protester carrying large signs on busy highway overpass is content-based if his "*message* angered drivers who then reacted and were distracted from the task of driving safely" but content-neutral if his "*presence* on that day and under those driving conditions created a 'spectacle' that led some drivers to

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[5] Whether an officer must read a message is persuasive evidence of an impermissible content-based purpose, but is not dispositive. *ACLU*, 466 F.3d at 796 n.12.

[6] There is, of course, an exception for certain "fighting words." *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

be distracted from the task of safely navigating the Beltline") (emphases in original).

Nor is the reaction of listeners a secondary effect of speech that can be regulated under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46 (1986). *See Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect.' "); *see also Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996) ("The Supreme Court has defined secondary effects as being correlated with, *but not directly a consequence of*, the impact of the speech.") (emphasis added).

Section 626.8, if it applied to Plaintiffs' conduct in this case, would appear to be just the kind of accession to the heckler's veto outlawed by the case law. Plaintiffs' speech was permitted until the students and drivers around the school reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8. This application of the statute raises serious First Amendment concerns.[7]

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[7] We recognize that one of our sister circuits, in a case discussing a nearly identical statute, has held otherwise. In *PeTA v. Rasmussen*, 298 F.3d 1198 (10th Cir. 2002), an animal-rights organization staged a protest outside of a junior high school shortly before the end of classes; a counterprotest was also held. *Id.* at 1201. "The protests were not noisy, but some students allegedly were distracted, stayed late, missed their rides, or sought to interact with the protesters." *Id.* at 1202. The police directed the protesters to cease, citing a state statute substantively mirroring § 626.8. The statute did not apply to junior high schools, however, and the police subsequently admitted their mistake.

We are mindful that this case involves a special circumstance, the presence of children. In particular, the evidence suggests that children were distracted by the Plaintiffs' pictures, and this distraction perhaps posed a danger as students crossed the streets around the school. Children may well be particularly susceptible to distraction or emotion in the face of controversial speech, and may not always be expected to react responsibly. These considerations, among others, might conceivably support the proposition that the heckler's veto principle is less sweeping where the targeted audience is children.

There is, however, no precedent for a "minors" exception to the prohibition on banning speech because of listeners' reaction to its content.[8] It would therefore

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The Tenth Circuit nonetheless held that the misapplication of the statute was content-neutral:

> Although the defendants misapplied the statute to PeTA, their misapplication of the statute was unrelated to the content of PeTA's speech. The school also applied the ban to META [the counter-protesters], which expressed the opposite message from PeTA. Defendants' actions were thus content-neutral.

*Id.* at 1204. We disagree with this analysis. That the statute was applied to protesters on both sides of the issue demonstrates only that it was *viewpoint*-neutral. *See Boos*, 485 U.S. at 319. Shutting down dueling protests does not discriminate based on viewpoint, but is nonetheless a content-based heckler's veto if the reason for the restriction was that bystanders were uncomfortable with the controversial content of the messages.

[8] There is, however, at least one circumstance in which First Amendment standards have been specially tailored to protect

be an unprecedented departure from bedrock First Amendment principles to allow the government to restrict speech based on listener reaction simply because the listeners are children. At the least, applying § 626.8 to Plaintiffs' speech in this case raises a novel constitutional issue. Unless we create a new exception to the "heckler's veto" doctrine (which we do not do), applying § 626.8 to Plaintiffs' speech would be unconstitutional.

We decline to create such an exception, in part because we can reasonably construe § 626.8 as not applicable to the present circumstances.[9] Where a construction of a statute would raise serious constitutional problems, courts "will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of [the legislature]." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

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children. *See Ginsberg v. New York*, 390 U.S. 629, 640-41 (1968) (relying on the state's interest "to protect the welfare of children and to see that they are safeguarded from abuses which might prevent their growth into free and independent well-developed men[, women] and citizens" to hold that it is permissible to protect children from being exposed to pornography that was not obscene) (internal quotations omitted).

[9] The California legislature may elect to draft a statute prohibiting disruptive messages outside school buildings where the disruption threatens the physical safety of school children while they are coming to, leaving, or attending school. We do not have before us, and therefore do not decide the constitutionality of, such a statute.

Here, if § 626.8 applies only to disruptions caused by the *manner* and not the *content* of speech, our First Amendment concerns are resolved. A statute that restricts speech only when it is disruptive because of its manner, not its content, is an example of content-neutral regulation that has been affirmed time and again. In *Grayned*, for example, in dealing with an anti-noise ordinance, the Supreme Court upheld the regulation of speech that would — because of its high-decibel manner of communication, not its content — prevent classroom teaching or studying.[10] 408 U.S. at 119. Similarly, we have narrowed an injunction prohibiting "shouting, screaming, chanting, or yelling" during demonstrations outside an abortion clinic to specify that such conduct be enjoined only if it is "in a volume that substantially interferes with the provision of medical services within the [clinic]." *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 686-87 (9th Cir. 1988). This narrow interpretation ensured that the speech was enjoined

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[10] The ordinance at issue in *Grayned* is strikingly similar to § 626.8. The ordinance there prohibited "willfully mak[ing] or assist[ing] in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." 408 U.S. at 108. The Supreme Court rejected a constitutional challenge because it concluded that the state supreme court would construe the ordinance narrowly to prohibit "only actual or imminent interference with the 'peace or good order' of the school." *Id.* at 111-12. It further held that the ordinance was not "a vague, general 'breach of the peace' ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school." *Id.* at 112. So construed, the ordinance "does not permit punishment for the expression of an unpopular point of view." *Id.* at 113.

only if its *manner* caused disruption to the clinic's services, rather than if its *content* upset the patients or staff. Therefore, we must address whether § 626.8 applies only where the manner, not the content, of speech near schools is distracting to listeners. If so, we need not decide the constitutionality of a content-restrictive statute, for such a statute is not before us.

*2. Construing § 626.8*

In similar circumstances — that is, to avoid deciding serious constitutional issues — federal courts have narrowly construed state or local statutes. *See, e.g.*, *Frisby*, 487 U.S. at 482; *Phelps v. Hamilton*, 59 F.3d 1058, 1070 (10th Cir. 1995) ("[Although] federal courts do not have the power to narrow a state law by disregarding plain language in the statute just to preserve it from constitutional attack . . . . , we are permitted to construe ambiguous state statutes and to extrapolate the true meaning of such statutes according to traditional rules of statutory construction, and then to judge the constitutionality of such statutes as so construed."); *Cohen v. City of Des Plaines*, 8 F.3d 484, 493 (7th Cir. 1993) (construing a city ordinance narrowly to avoid Establishment Clause problem); *see also Grayned*, 408 U.S. at 111-12 (construing local ordinance narrowly after concluding that the state supreme court would so construe the ordinance). In our view, the Supreme Court of California would, were the issue presented to them, construe § 626.8 to apply only to interference or disruption caused by the manner of a person's expressive conduct.

[7] California Penal Code § 626.8 provides, in relevant part:

> (a) Any person who comes into any school building or upon any school ground, or street, sidewalk or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities, is guilty of a misdemeanor if he or she does any of the following:
>
> > (1) Remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by a . . . sheriff or deputy sheriff . . . .
> >
> > (2) Reenters or comes upon that place within seven days of being asked to leave by a person specified in paragraph (1).
> >
> > (3) Has otherwise established a continued pattern of unauthorized entry.
>
> *This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.*

Cal. Penal Code § 626.8(a) (emphasis added).

As an initial matter, California courts regularly construe arguably ambiguous statutes narrowly to avoid First Amendment problems. In doing so, California courts have enunciated the principle that "the court should construe the enactment so as to limit

its effect and operation to matters that may be constitutionally regulated or prohibited." *People v. Superior Court (Anderson)*, 151 Cal. App. 3d 893, 895-96 (Ct. App. 1984) (quoting *Welton v. City of Los Angeles*, 18 Cal. 3d 497, 505-06 (1976)). For example, in *In re Manuel G.*, 16 Cal. 4th 805, 814 (1997), the California Supreme Court considered a statute imposing criminal penalties on "[e]very person who attempts, by means of any threat or violence, to deter or prevent an executive officer from performing any duty imposed upon such officer by law . . . ." The court agreed with lower court decisions narrowly construing the statute: "To avoid the risk of punishing protected First Amendment speech, . . . the term 'threat' has been limited to mean a threat of unlawful violence used in an attempt to deter the officer." *Id.* at 814-15; *see also People v. Zimmerman*, 15 Cal. App. 4th Supp. 7, 12 (Ct. App. 1993) ("A statute challenged for overbreadth is not void if its terms are reasonably susceptible to an interpretation consistent with the Constitution."); *City & County of San Francisco v. Eller Outdoor Adver.*, 192 Cal. App. 3d 643, 663 (Ct. App. 1987) ("It is the duty of the courts, wherever possible, to construe a statute in a manner which is reasonable, consistent with the statutory purpose, and eliminates doubts as to its constitutionality."); *Loska v. Superior Court*, 188 Cal. App. 3d 569, 584 (Ct. App. 1986) ("In order to save the ordinance as a whole, we 'construe the enactment so as to limit its effect and operation to matters that may be constitutionally . . . prohibited.' ") (alteration in original, quoting *Welton*, 18 Cal. 3d at 505).

[8] Here, a narrowing construction is invited by the plain language of § 626.8: "This section shall not be

utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly." The California legislature thus contemplated the possibility that § 626.8 might, if construed broadly, apply to constitutionally protected speech, and sought to prevent such an application. Further, the exclusionary clause is drafted expansively, barring applications that "impinge," rather than "violate," protected speech. Thus, the legislature seemingly meant to make the statute inapplicable where First Amendment rights are possibly affected, even if the statute *could* validly restrict those rights.[11]

**[9]** Finally, apart from the exclusionary clause, the language of § 626.8 suggests that it was intended to apply to manner rather than content of speech. Section 626.8 applies where the "presence" or "acts" of a person "interfere[s]" with the school's activities or "disrupt[s] the school or its pupils." The terms "presence" and "acts" indicate that § 626.8 is concerned with the physical aspects of a speaker's behavior, *not* with the

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[11] The California legislature sometimes drafts First Amendment savings clauses more narrowly, so as merely to limit the statute to what is constitutionally permissible. For instance, California Penal Code § 420.1 provides that it "shall not apply to . . . any person who is engaging in activities protected by the California Constitution or the United States Constitution." The same "shall not apply to" language is used in Penal Code §§ 602(o), 602.1, and 602.8. Similarly, Penal Code § 646.9(f)-(g) provides that "[c]onstitutionally protected activity is not included within the meaning of" certain terms in the statutory definition of the crime. This "shall not apply" and "is not included" language is narrower than the broad "shall not be used to impinge" language in the statute at issue here. We should give effect to this difference.

content of his speech. Similarly, the words "interfere" and "disrupt" are active verbs that focus on the behavior of the speaker, not on the reaction of the listeners.

**[10]** As a whole, the language of § 626.8 does not evidence any intent to criminalize a person's behavior based on a listener's reaction to the content of his speech. We thus conclude that the California courts would construe § 626.8 to apply to speech only when the disruption caused by the speaker is caused by the *manner* of the speech. Controversial words and images that, because of their content, upset the listener and cause the *listener* to behave disruptively are not covered by the statute.

**[11]** Under our narrow construction, § 626.8 does not apply to Plaintiffs' conduct in driving their trucks around Dodson Middle School. That conduct was disruptive only because of the audience's reaction to the content of the speech. Children became upset, a few boys talked about throwing rocks, other children stood in the middle of the street and slowed the entry of students into school, and at least one class spent time discussing the photos of fetuses instead of their prescribed school work. All of these reactions were triggered by the upsetting message on the truck — not by noise, or physical obstruction, or any other aspect of Plaintiffs' activities. Construing § 626.8 as we do, the statute provided no basis to prohibit Plaintiffs from continuing to drive their vehicles around the school before classes began.

**[12]** Section 626.8 was the only authority cited by Defendants in asking Plaintiffs to leave, and thus

provided the only possible source of a significant governmental interest necessary to restrict Plaintiffs' speech in a public forum. *See Ward*, 491 U.S. at 791-92. Misapplying a statute is not a significant governmental interest. Defendants have suggested no other significant governmental interest to justify restricting Plaintiffs' speech. We therefore hold that the Deputy Sheriffs violated Plaintiffs' First Amendment right of free speech.

**B. Qualified Immunity**

We next consider whether the district court correctly determined that the individual defendants were entitled to qualified immunity for Plaintiffs' First Amendment claims.[12] We review a grant of qualified immunity de novo. *Bias v. Moynihan*, 508 F.3d 1212, 1218 (9th Cir. 2007).

**[13]** Qualified immunity involves a two-step inquiry: (1) whether the officer's conduct violated a constitutional right; and (2) whether that right was clearly established when viewed in the context of this case. *See Ganwich v. Knapp*, 319 F.3d 1115, 1119 (9th Cir. 2003) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). As discussed above, Plaintiffs have established that Defendants violated their constitutional rights. We must therefore decide whether those rights were clearly established.

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[12] As noted above, it is not entirely clear whether the district court decided this issue on the merits.

A right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Even if the right is clear, however, we must determine whether the officers made a reasonable mistake about the law's requirements. *See id.* at 205.

[14] Here, it was clear that the officers could not apply a time, place or manner restriction on speech to the Plaintiffs' activities around the school without advancing any significant state interest by doing so. But the officers could have made a reasonable mistake in believing that § 626.8 applied to Plaintiffs' conduct and thus advanced a significant state interest. *Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[A]n officer who acts in reliance on a duly-enacted statute or ordinance is ordinarily entitled to qualified immunity."). There was no case law determining whether § 626.8 does or does not apply to the circumstances the officers faced. *See Dittman v. California*, 191 F.3d 1020, 1027 (9th Cir. 1999) (defendant entitled to qualified immunity where she "acted pursuant to a duly enacted state statute" and "there was no clear case law in either the federal courts or the state courts of California establishing that" the statute may not be applied in the challenged manner); *see also Way v. County of Ventura*, 445 F.3d 1157, 1166 (9th Cir. 2006) (Wardlaw, J., concurring) (defendants entitled to qualified immunity where they relied on police policy and state statute in conducting unconstitutional strip-search because "the policy and the state statute had not fallen into desuetude, nor were they patently violative of fundamental

constitutional principles") (citation and quotation marks omitted). And, although we believe that our reading of the statute is one California courts would adopt, that conclusion is premised in part on the practice of avoiding unconstitutional interpretations of statutes, not solely on the language of the statute.

[15] Moreover, as we have noted, there is some question whether the heckler's veto consideration applies where the target audience consists of children. As far as we have been able to determine, there is no case law holding either that it does or that it does not. In these circumstances, we cannot conclude that the law was sufficiently clear that a reasonable officer would know that it was unlawful to request the Plaintiffs to cease driving their truck around the area. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (relevant inquiry is whether "the state of the law [at the relevant time] gave [defendants] fair warning that their [conduct] was unconstitutional"); *Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007) (qualified immunity where court itself "had to wrestle with difficult and unsettled questions about the First Amendment interests implicated by [plaintiffs' conduct] and the weight of the countervailing interests asserted by the State"). We therefore affirm the district court's conclusion that the individual defendants are entitled to qualified immunity on the First Amendment claim.

### C. Summary of First Amendment Claim

California Penal Code § 626.8, read as we believe a California court would construe it, does not apply to Plaintiffs' expressive activities in driving their trucks

around Dodson Middle School. Thus, the officers' order that Plaintiffs leave the area around Dodson Middle School violated Plaintiffs' First Amendment rights. The individual defendants, however, have qualified immunity from a damages action. As this immunity does not extend to injunctive relief, *see Hydrick v. Hunter*, 500 F.3d 978, 988 (9th Cir. 2007), we remand for the district court to consider Plaintiffs' request for injunctive relief in light of our First Amendment holding.

## IV. FOURTH AMENDMENT CLAIMS

We now address Plaintiffs' Fourth Amendment claims. Plaintiffs contend that the Deputy Sheriffs violated their Fourth and Fourteenth Amendment rights by unreasonably detaining Kulas and Padberg for seventy-five minutes. Plaintiffs also claim that the Deputy Sheriffs searched the security vehicle without securing Kulas's or Padberg's consent. We review de novo the lawfulness of a search or seizure, *United States v. Stafford*, 416 F.3d 1068, 1073 (9th Cir. 2005), and address each claim in turn.

### A. The Seventy-Five Minute Detention

Plaintiffs contend that their seventy-five minute detention at the scene was unreasonably long and therefore violated their Fourth Amendment rights. We agree.

[16] A dispatcher's call to the Deputy Sheriff indicated that a large white truck was disturbing Dodson Middle School and that the truck was accompanied by a vehicle similar to a police cruiser.

Based on this information, the Deputy Sheriffs had reasonable suspicion to believe Kulas and Padberg may have been violating several California Vehicle Code provisions.[13] *See Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004) (requiring that investigative stops be predicated on reasonable suspicion to believe further investigation may produce evidence that the person is involved in criminal activity). Because there was reasonable suspicion, the initial investigative stop was proper.

[17] Once the sheriffs validly initiated an investigative stop, no rigid time constraints governed its duration, so long as the sheriffs acted diligently and pursued a means of investigation likely to confirm or dispel their suspicions quickly. *United States v. Sharpe*, 470 U.S. 675, 686 (1985). Here, although a brief detention to investigate possible Vehicle Code violations was warranted, that investigation should have taken no more than a few minutes — enough time to examine the security vehicle and to determine if there were any outstanding warrants involving the vehicle or its occupants.[14]

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[13] *E.g.*, Cal. Veh. Code § 25268 (prohibiting display of "a flashing amber warning light on a vehicle"), § 25269 (prohibiting display of "a flashing or steady burning red warning light on a vehicle"), § 25279(b) (private security vehicles can use flashing amber lights only if vehicle is clearly marked as private security), § 27605 (prohibiting ownership and operation of a vehicle painted to resemble a police car).

[14] Defendants suggest that the detention was also reasonable because of potential violations of two California Education Code provisions: § 32210 ("Any person who willfully disturbs any public school or any public school meeting is guilty of a

Defendants argue that the seventy-five minute detention was justified by their reasonable suspicion that Plaintiffs violated California Penal Code § 626.8. But a person is only guilty of a crime pursuant to § 626.8 if they (1) remain at a school *after being asked to leave*; (2) reenter within seven days of being asked to leave; or (3) engage in a "continued pattern of unauthorized entry." Plaintiffs did none of these things. They were not asked to leave until the *end* of the seventy-five minute detention, at which point they promptly left. So, with respect to § 626.8, the officers *at no time* had any reason to suspect that the Plaintiffs had committed or were about to commit this crime.[15]

There is a second reason why the length of the detention was not justified by reasonable suspicion.

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misdemeanor. . . .") and § 44811 ("[A]ny . . . person whose conduct in a place where a school employee is required to be in the course of his or her duties materially disrupts classwork or extracurricular activities or involves substantial disorder is guilty of a misdemeanor."). These provisions also might justify a brief detention. But, as with the suspected Vehicle Code violations, there is no explanation of why it would take seventy five minutes to investigate them. Presumably, just speaking to Plaintiffs and school officials would be sufficient.

[15] That Plaintiffs did not commit a crime under § 626.8 does not impact the potential application of the statute to their First Amendment rights. The statute proceeds in two parts: First, faced with conduct that interferes with or disrupts a school, an officer can order the disrupting person to leave, on pain of prosecution if he does not. If applicable to protected speech activity, this order would itself impact First Amendment rights. Second, only if the person refuses to leave when ordered to do so can he be charged with a crime. Because Plaintiffs left immediately after being ordered to do so, they never committed a crime under § 626.8.

Much of the detention time was spent waiting for the Deputy Sheriffs' supervisor to come to the scene to assist with this novel situation. But once it became clear that no Vehicle Code violations had taken place, the Deputy Sheriffs were no longer authorized to detain Plaintiffs based on a reasonable suspicion that any particular crime had been committed. Instead, the Deputy Sheriffs continued to detain plaintiffs because they were waiting for their supervisors to help them figure out *whether* any crime had been committed.

This basis for continued detention does not comport with Fourth Amendment standards. The investigative purposes permitted by detention are ones of fact, not law. *See Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (listing some investigative techniques that may be used during a *Terry* stop: "interrogation[;] . . . communicat[ion] with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted[;] . . . [and determination of whether] in fact an offense has occurred in the area"). Thus, an officer's uncertainty about the law cannot excuse the detention. To permit otherwise "would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce and obey." *See United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000); *see also United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable.") (emphasis in original); *cf. United States v. Booker*, 496 F.3d 717, 722 (D.C. Cir. 2007) ("Unlike stops premised on mistakes of fact, '[s]tops premised on a mistake of law, even a

reasonable, good-faith mistake, are generally held to be unconstitutional.' ") (alteration in original) (quoting *United States v. Coplin*, 463 F.3d 96, 101 (1st Cir. 2006)).

[18] In sum, neither California Penal Code § 626.8 nor the search for other code provisions that might have been violated justified the Deputy Sheriffs in detaining the Plaintiffs for seventy-five minutes while the sheriffs tried to find some basis for charging them. Consequently, we hold that the deputies' detention of Kulas and Padberg violated their Fourth and Fourteenth Amendment rights. Accordingly, we reverse both the district court's grant of summary judgment in favor of Defendants and the district court's denial of summary judgment for Plaintiffs with respect to this issue.

**B. Search of Security Vehicle**

Plaintiffs also maintain that the Deputy Sheriffs violated their Fourth Amendment rights by improperly searching Plaintiffs' security vehicle. Defendants contend that the deputies had the consent of Kulas and Padberg and, in any event, the Deputy Sheriffs acted pursuant to California Vehicle Code § 2806, which permits inspection of vehicles suspected of violating the Vehicle Code. We conclude that Plaintiffs have raised a genuine issue of material fact as to whether the deputies violated their Fourth Amendment rights.

At the outset, we note a significant factual dispute. Padberg claimed that deputies searched the security vehicle twice, but only secured consent for the second

search. Deputies Repcik and Darling remember only one search, and claim they had permission. The recording from the security vehicle's camera does not clearly identify how many times the deputies entered the vehicle, or whether they had consent. This conflicting testimony raises a credibility question that only the factfinder can resolve. *See Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997). For our review of the district court's grant of summary judgment for Defendants, we assume that the Plaintiffs' version of events is true. *See Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005).

Thus, for the purposes of this appeal, we accept Plaintiffs' assertion that two searches took place, and that the first was not supported by consent. We must therefore evaluate whether the first search violated Plaintiffs' Fourth Amendment rights. Defendants cite California Vehicle Code § 2806 as justification for this search. We conclude that, absent consent, the search was improper.

Section 2806 provides as follows:

> Any . . . deputy sheriff . . . having reasonable cause to believe that any vehicle or combination of vehicles is not equipped as required by this code or is in any unsafe condition as to endanger any person, may require the driver to stop and submit the vehicle or combination of vehicles to an inspection and those tests as may be appropriate to determine the safety to persons and compliance with the code.

Cal. Veh. Code § 2806. The deputies entered Plaintiffs' security vehicle to determine whether the flashing lights could be activated. They now contend that their entry was necessary to ensure that the vehicle complied with the Vehicle Code.

[19] We addressed the validity of § 2806 searches in *United States v. Portillo*, 633 F.2d 1313 (9th Cir. 1980). In *Portillo*, a police officer opened a vehicle's trunk to identify the cause of a broken rear brake light. *Id.* at 1315. We upheld the search, reasoning that § 2806 allowed police to enter a vehicle to discover the cause of a potentially dangerous condition: in that case, the possibility that the car's electrical wiring had degraded. *See id.* at 1318-19. We also cautioned, however, that the defect justified entry because it "was not only a code violation, but a threat to the safety of persons on the highway" and that further inspection might either provide an easy remedy or identify more serious safety concerns. *Id.* at 1319.

[20] *Portillo* does not legitimize the search of Plaintiffs' security vehicle. A search's reasonableness depends on "the degree to which it intrudes upon an individual's privacy, and . . . the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). Unlike *Portillo*, the existence of the flashing lights here does not suggest any hidden cause that might be a more serious safety hazard, and further inspection of the lights would not likely expose more serious code violations. None of the Vehicle Code sections cited by the Deputy Sheriffs turn on whether the lights are *capable* of activation. Thus, entry to

activate the lights would not further the government's interests.[16] We therefore hold that, absent consent, this search unreasonably intruded on Plaintiffs' Fourth Amendment rights.[17]

### C. Qualified Immunity

We now consider whether the Deputy Sheriffs are entitled to qualified immunity on the Fourth Amendment issues. We conclude that they are not.

#### *1. Liability for the Unreasonable Detention*

[21] The deputies cannot receive qualified immunity for their unreasonably lengthy detention of Kulas and Padberg. The deputies' constitutional duty to act diligently and pursue a means of investigation likely to confirm or dispel their suspicions quickly was clearly established on the date of the detention in this case. *See Sharpe*, 470 U.S. at 686. Moreover, it should

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[16] The Sheriff's Department also argues that the light switch was in plain view. That the switch was visible does not justify entry to flip the switch without some independent justification for entering the vehicle.

[17] To the extent consent existed for each search, we reject Plaintiffs' contention that the consent was not voluntary. "Whether consent to search was voluntarily given is 'to be determined from the totality of all the circumstances.' " *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). We find nothing in the record that suggests coercion. The only factor militating against voluntariness is the deputies' failure to advise Kulas and Padberg of their right to refuse consent. This alone does not show that their consent was involuntary. *See Schneckloth*, 412 U.S. at 227.

have been readily apparent to a reasonable officer that § 626.8 provided no basis for a detention, as no violation of the statute occurred unless the Plaintiffs stayed on the premises after being asked to leave. It was also apparent that calling school liaison Deputy Sheriff Despot or Assistant Principal Roberts was not likely to quickly confirm or dispel any suspicion of wrongdoing. Moreover, neither Despot's nor Roberts's presence was necessary to enforce § 626.8. As the unlawfulness of their actions was apparent, the deputies are not entitled to qualified immunity. *See Hope*, 536 U.S. at 739.

*2. Liability for Searches of the Security Vehicle*

[22] Assuming Plaintiffs' allegations to be true, we conclude that the deputies do not have qualified immunity for the first search of the security vehicle. The deputies acted under authority given by California Vehicle Code § 2806, under which we have previously upheld warrantless searches of vehicles. *See Portillo*, 633 F.2d at 1318-19. *Portillo*, however, clearly warned that police may only search a vehicle under § 2806 when there is reasonable cause to believe inspection may uncover evidence of either potentially dangerous conditions or more serious code violations. *See id.* at 1319. Entering the vehicle to turn on the lights was not likely to provide information about either. Thus, the Sheriff's Deputies are not entitled to qualified immunity.

**D. Summary of Fourth Amendment Claims**

[23] Entry of summary judgment for the Sheriff's Department defendants was improper. The deputies

violated Plaintiffs' rights by unreasonably detaining them at the scene. Moreover, Plaintiffs have raised a genuine issue of material fact with regard to whether the deputies unlawfully entered their security vehicle. Finally, we conclude that the individual deputies are not entitled to qualified immunity on summary judgment. Accordingly, we reverse the district court's grant of summary judgment for Defendants on both Fourth Amendment claims. We also reverse the district court's denial of summary judgment for Plaintiffs on the unreasonable detention claim.

## V. DISMISSAL OF SHERIFF BACA

We affirm the district court's dismissal of Sheriff Baca. An official capacity suit against a municipal officer is equivalent to a suit against the entity. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). When both a municipal officer and a local government entity are named, and the officer is named only in an official capacity, the court may dismiss the officer as a redundant defendant. *See Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). Thus, Sheriff Baca is a redundant defendant.[18]

## VI. CONCLUSION

For the foregoing reasons, we hold that Plaintiffs' First Amendment rights were violated. The individual

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[18] Plaintiffs argue that Baca is not a redundant defendant because the Sheriff's Department may have sovereign immunity. Plaintiffs, however, misstate the law: Local government entities do not have sovereign immunity. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978).

defendants, however, are entitled to qualified immunity from a damages action on this issue. Accordingly, we reverse the district court's grant of summary judgment for defendants and the denial of summary judgment for Plaintiffs on the First Amendment issue. We affirm the district court's dismissal of the damages action against the individual defendants on qualified immunity grounds on the First Amendment issue but remand for consideration of injunctive relief. We also affirm the district court's dismissal of Sheriff Baca.

We also hold that Plaintiffs have conclusively shown a violation of their Fourth Amendment rights because of the unreasonable length of Kulas and Padberg's detention. Moreover, Plaintiffs have raised a genuine issue of fact as to whether the Deputy Sheriffs unlawfully entered their security vehicle. We therefore reverse the district court's grant of summary judgment for Defendants on both Fourth Amendment claims and reverse the district court's denial of summary judgment for Plaintiffs on the unreasonable detention issue.

We remand for further proceedings consistent with this opinion. In particular, we leave it to the district court to address, in light of this opinion, Plaintiffs' conspiracy claim and Plaintiffs' request for injunctive relief.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. EACH SIDE TO BEAR ITS OWN COSTS.**

## APPENDIX B

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**Case No. SACV 03-386-GLT (MLGx)**

**[Filed January 24, 2005]**

CENTER FOR BIO-ETHICAL REFORM, INC. ET AL.,
Plaintiffs,

vs.

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT ET AL.,
Defendants.

**ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Plaintiffs' motion for summary judgment is DENIED. Defendants' motions for summary judgment are GRANTED.

### I. BACKGROUND

Plaintiffs Paul Kulas and Thomas Padberg are volunteers for Plaintiff Center for Bio-Ethical Reform, Inc. In March 2003 Kulas drove a truck around Dodson

Middle School in Los Angeles County displaying on the side of the truck large graphic images of first-term aborted fetuses. Padberg followed Kulas in a car. Plaintiffs began circling the middle school at about 7:30 a.m. to get, according to them, the greatest exposure for their pictures. School officials and other individuals complained to Defendant Los Angeles County Sheriff's Department ( "LACSD").

Approximately 30 minutes after Plaintiffs began circling, Sheriff's Deputies Darling and Repcik pulled Plaintiffs over. Darling and Repcik called Sergeant Aguilar and Deputy Despot to the scene. Despot also summoned Defendant Roberts, a school administrator. Plaintiffs were advised of California Penal Code section 626.8 pertaining to disrupting a school, were told they were disrupting the school and its students, and were ordered to leave the school area and not return with the graphic images. They left without incident.

Plaintiffs filed this action under 42 U.S.C. § 1983, alleging violation of their First and Fourth Amendment rights and conspiracy to deprive them of First Amendment rights.

On October 22, 2003, this Court found individual Defendants Aguilar, Despot, Darling, Repcik, and Roberts are entitled to qualified immunity and dismissed them in their individual capacity.[1] The

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[1] There is a question whether the Court granted the individuals qualified immunity on the First Amendment claim only, or on all claims. Because the Court now grants Defendants' motions for summary judgment on all claims, this issue is moot.

Court also dismissed Defendants Baca, Aguilar, Despot, Darling, and Repcik in their official capacity as redundant Defendants to LACSD. The Court denied Defendants' motion to dismiss the complaint as to LACSD and Defendant Roberts in his official capacity. The Court also denied Plaintiffs' request for a preliminary injunction.

Plaintiffs appealed the Court's October 22, 2003 ruling to the Ninth Circuit, which affirmed. All parties now move for summary judgment on all claims.

## II. DISCUSSION

Summary judgment is proper if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

### A. First Amendment and California Penal Code § 626.8

Plaintiffs were ordered to leave the streets adjacent to the school pursuant to California Penal Code section 626.8, which provides:

> Any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities . . . is guilty of a misdemeanor if he or she . . . [r]emains there after being asked to leave by

> the chief administrative official of that school . . . or by a . . . sheriff or deputy sheriff . . . . This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.

Cal. Penal Code § 626.8(a), (a)(1) (West 1999).

Plaintiffs claim application of this statute to their activities violated their First Amendment right to free speech.

1. "Lawful Business"

If Plaintiffs' activities were "lawful business," section 626.8 was improperly applied to them. Section 626.8 defines "lawful business" as "a reason for being present upon school property which is not otherwise prohibited by statute, by ordinance, or by any regulation adopted pursuant to statute or ordinance." Id. § 626.8(c)(2). Because Plaintiffs' act was prohibited by two state statutes, it was not lawful business under section 626.8.

California Education Code section 44811 states: "Any . . . person whose conduct in a place where a school employee is required to be in the course of his or her duties materially disrupts classwork or extracurricular activities or involves substantial disorder is guilty of a misdemeanor." Cal. Educ. Code § 44811(a). The undisputed facts show at least one class had to devote class time to discussing Plaintiffs' conduct. The deviation from the regular curriculum was a material disruption of the classwork.

The undisputed facts show Plaintiffs' conduct also caused substantial disorder at the school. First, two or three girls began crying after seeing the truck. (Pls.' Statement Uncontroverted Facts ¶ 77 [hereinafter "SUF"].) Second, 10-12 boys began planning to throw rocks at the truck. (Pls.' SUF ¶ 77.) Third, school administrators had difficulty getting the students from the area outside the school buildings into the classrooms, pursuant to school policy. (Roberts Dep. at 38:3-13.) Fourth, at least one class deviated from its regular curriculum to discuss Plaintiffs' conduct. (Pls.' Statement Genuine Issues ¶ 18 [hereinafter "SGI"].) These facts, taken together, show Plaintiffs' conduct caused substantial disorder at the school.[2] Plaintiffs' act violated section 44811.

California Education Code section 32210 provides: "Any person who willfully disturbs any public school . . . is guilty of a misdemeanor . . . ." Plaintiffs' disturbance was willful. They drove around the school from approximately 7:30 a.m. to 8:00 a.m., the time children typically arrive at school, in order to ensure the greatest exposure for the images on the truck. (Pls.' SGI ¶ 12.) They chose a middle school, where

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[2] Defendants also state up to five students left school before the end of the day because they were upset by Plaintiffs' images. It does not appear Roberts has personal knowledge of this fact. The fact is not in Roberts's Declaration. At the preliminary injunction hearing, Roberts testified the school counselors spoke to the children who left, but he did not speak to them. (Lehman Decl. Ex. 10 at 25:13-20.) Defendants do not present declarations of the school counselors or anyone who witnessed the children leaving. Defendants also do not present school records showing the children left early. The Court does not consider the fact in this ruling.

most children are between 11 and 13 years old. Plaintiff Kulas has observed children become upset by the images on prior occasions. Children have reacted by expressing disbelief, crying, fainting, experiencing physical illness, making obscene gestures at the truck, and throwing things at the truck. (Kulas Dep. at 70:18-71:20; Pls.' SGI ¶ 76.) Plaintiffs' act violated section 32210.

Because Plaintiffs' act was prohibited by state statutes, Plaintiffs did not have lawful business at the school.

2. Disruption

Penal Code section 626.8 also requires Plaintiffs' presence or acts to "interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities." As discussed above, Plaintiffs' truck did interfere with the peaceful conduct of the school and disrupted the school and its pupils.

3. Constitutionally Protected Speech

Section 626.8 may not be used "to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly."

Expressive activity by members of the public may be prohibited on public sidewalks adjacent to school grounds if it "'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" Grayned v. City of Rockford, 408 U.S. 104, 118 (1972) (quoting Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 513)). Plaintiffs' expressive activity

materially disrupted classwork and involved substantial disorder at the school. Plaintiffs did not have a constitutional right to engage in their expressive activity on the public streets adjacent to the school.

The restriction on Plaintiffs' speech was constitutional if it was a content-neutral time, place, and manner restriction that served a significant government interest, was narrowly tailored to advance that interest, and left open ample alternative channels of communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

First, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 828 (1995). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." Ward, 491 U.S. at 791.

Plaintiffs have not presented a genuine issue of material fact showing Defendants restricted Plaintiffs' speech based on the content of their message. The parties agree "LASD personnel and Art Roberts ordered Plaintiffs to stop their speech activity . . . because Plaintiffs' pictures were causing a reaction that they claimed was disruptive." (Pls.' SUF ¶ 50.) Roberts advised Plaintiffs their pictures were disruptive to the school and its students. (Pls.' SGI ¶ 59.) Plaintiffs were told to leave because of the disruption caused by the graphic pictures, not because

the pictures concerned abortion or because Defendants disagreed with Plaintiffs' viewpoint.[3]

The restriction on Plaintiffs' speech was a valid content-neutral time, place, and manner restriction. It furthered the significant government interest of having an "undisrupted school session conducive to the students' learning." Grayned, 408 U.S. at 119 (finding this a compelling interest). It was narrowly tailored to advance this interest. Plaintiffs were ordered to leave only the public streets adjacent to the school area and were not prohibited from driving their truck on other public streets. (Pls.' SGI ¶ 61.) Finally, it left open ample alternative channels of communication. Plaintiffs were not prohibited from conveying their

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[3] There would be a triable issue of fact as to whether the deputies initially responded to the scene because of the content of Plaintiffs' message. The log of the dispatcher's call states, "'Anti-abortion' truck with offensive language/pictures is circling the school and video taping the school and surrounding area." (Pls.' SUF Ex. 8 at 71:23-74:9 & Ex. 9.) However, this does not show Defendants told Plaintiffs to leave because of the content of the message.

Deputy Repcik wrote in his incident report, "due to the often volatile nature of the issue of abortion." (Repcik Dep. at 63:25-64:5.) This does not raise a genuine issue of material fact as to whether Defendants told Plaintiffs to leave because of the content of Plaintiffs' message. Repcik stated he wrote the phrase to document the volatile and emotional nature of the issue to explain why Plaintiffs' conduct caused a "very strong reaction from the children going to school." (Repcik Dep. at 63:25 - 65:21.) Deputy Repcik's testimony shows Defendants told Plaintiffs to leave because of the disruption, not because of the content or viewpoint of the images.

message in a nondisruptive manner or from going to any place other than the streets adjacent to the school.

B. Conspiracy Claim

Because there was no violation of Plaintiffs' First Amendment rights, Defendants cannot be liable for conspiracy to violate Plaintiffs' First Amendment rights. Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 930 (9th Cir. 2004) ("[T]o state a claim for conspiracy under [42 U.S.C.] § 1985, a plaintiff must first have a cognizable claim under [42 U.S.C.] § 1983.").

C. Fourth Amendment Claim

Plaintiffs claim they were subjected to an unlawful search and seizure under the Fourth Amendment.

1. Seizure

"The Fourth Amendment prohibits 'unreasonable searches and seizures' by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." United States v. Arvizu, 534 U.S. 266, 273 (2002) (citing Terry v. Ohio, 392 U.S. 1 (1968)). Here, the parties agree Plaintiffs were not free to leave during the stop. The detention was a "seizure" for Fourth Amendment purposes. Gallegos v. City of L.A., 308 F.3d 987, 990 (9th Cir. 2002).

The parties dispute whether Plaintiffs' detention was an investigatory stop or an arrest. During an investigatory stop, "the Fourth Amendment is satisfied if the officer's action is supported by reasonable

suspicion to believe that criminal activity may be afoot." Arvizu, 534 U.S. at 273 (internal quotations omitted). A determination of reasonable suspicion must consider the totality of the circumstances, and it requires a lesser showing than that needed to find probable cause or a preponderance of evidence. Id.

If the detention qualifies as an arrest, Defendants must show the Deputies had probable cause to arrest Plaintiffs. Gallegos, 308 F.3d at 990. "There is no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest." Id. at 991 (internal quotation omitted). The Court conducts a fact-specific inquiry of the totality of the circumstances, including how intrusive the stop was and whether the deputies' methods were reasonable given the circumstances. Id.

Many facts regarding the stop are not disputed. The stop took approximately 75 minutes. For some period of time, the deputies held Plaintiffs' driver's licenses. The deputies did not draw their guns, handcuff Plaintiffs, tell Plaintiffs they were under arrest, or place Plaintiffs in a patrol car. Plaintiffs were able to walk around the general area, talk to each other, obtain a notepad to take notes, and call their boss.

Given the totality of the circumstances, this was an investigatory stop, not an arrest. The stop was not substantially intrusive, and the deputies' methods were reasonable. See id. at 991-92 (finding a detention was an investigatory stop rather than an arrest even when police pulled their guns on the suspect,

handcuffed him, placed him in the patrol car, and took him to the police station).

To justify the investigatory stop, Defendants must show the deputies had a reasonable suspicion to believe criminal activity may be afoot. Plaintiffs do not seriously contest, and it appears to the Court, the deputies had a reasonable suspicion. They were responding to a call about a truck displaying anti-abortion images, with a video camera, circling a school. See United States v. Terry-Crespo, 356 F.3d 1170, 1174 (9th Cir. 2004) (holding a sufficiently reliable 911 call supported a reasonable suspicion justifying an investigatory stop). The call provided them a reasonable basis to suspect Plaintiffs were disturbing the school or engaging in other unlawful activity. When the deputies located Plaintiffs, they believed Plaintiffs' car looked similar to a police car. This gave them a reasonable suspicion Plaintiffs' car was intended to mimic a police car.

Plaintiffs argue the length of the stop was unconstitutionally long. The length of time is an important factor in determining whether the stop was as minimally intrusive as necessary to justify a reasonable suspicion. United States v. Sharpe, 470 U.S. 675, 685 (1985). To determine minimal intrusiveness, the Court takes into account "the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." Id. However, the length is not determinative. See id. ("[O]ur cases impose no rigid time limitation" on investigatory stops).

Here, the law enforcement purposes served by the stop were primarily to prevent further disruption at the school and to evaluate whether Plaintiffs' follow car was lawful.[4] The first responding deputies called their supervisor, Sergeant Aguilar, to the scene because they were not familiar with the appropriate course of action in the situation. Once Aguilar arrived, they called Deputy Despot, the liaison with Dodson Middle School. These steps were reasonably needed to ensure an appropriate response to Plaintiffs' conduct while preventing further disturbance at the school. The record shows it took between 45 and 60 minutes for Aguilar and Despot to arrive.

Deputy Despot brought Roberts, the assistant principal of the school, to the scene to explain the situation to Plaintiffs. This was reasonably necessary to ensure no further disruption at the school. The record shows Roberts arrived an hour or more after the stop.

Plaintiffs present no evidence of delay in calling Aguilar, Despot, or Roberts to the scene. There also is no evidence these individuals delayed coming to the scene after they were called. The time it took for these individuals to arrive was as minimally intrusive as necessary.

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[4] The vehicle was a Crown Victoria with outside spotlights, a push bar on the front bumper, an antenna mounted on the roof and trunk, red and amber flashing lights, a security cage separating the rear seat, and a video camera mounted on the dashboard. The parties do not dispute the deputies initially believed the vehicle may not have been lawful because it looked similar to a police car, but ultimately determined it to be a lawful security vehicle.

During the investigatory stop, the deputies checked Plaintiffs' license plates and identifications and investigated whether Plaintiffs' security vehicle violated any laws, which included contacting a traffic investigator to research the legality of the vehicle's equipment. The record does not show the deputies delayed these investigatory tasks.

The deputies diligently pursued a course of investigation "likely to confirm or dispel their suspicions quickly." Sharpe, 470 U.S. at 686. Seventy-five minutes was reasonably needed to effectuate the purposes of the stop. See Gallegos, 308 F.3d at 992 (finding 45-60 minutes was not an unreasonable length of time to drive to and from the police station and wait for a supervising officer to arrive, when the suspect was not handcuffed or in the police car the whole time).

2. Search

Plaintiffs contend two events constituted unlawful searches. First, without obtaining Plaintiffs' consent, Deputy Repcik entered the "security vehicle" car, looked for the switch for the flashing lights, and turned on the lights.

The parties presented no legal authority on this issue. The Court finds Repcik's act was not an unlawful search.

> Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an

> everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.

South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

"The privacy interests in an automobile are constitutionally protected; however, . . . the ready mobility of the automobile justifies a lesser degree of protection of those interests." California v. Carney, 471 U.S. 386, 390 (1985). Also, "because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy." Id. at 391.

Here, Repcik's inspection of the "security vehicle" car was reasonable. The deputies believed the vehicle looked similar to a police car and may have violated the Vehicle Code. Plaintiffs' vehicle was readily mobile. The switch in the passenger compartment was relatively open to plain view. Entering the vehicle to turn on the lights was necessary to assess the vehicle's features to determine if it violated the Vehicle Code.

Second, Plaintiffs argue their consent to the deputies' later search of the car was not free and voluntary. See Florida v. Royer, 460 U.S. 491, 497 (1983) ("[T]he State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given . . . ."). Whether consent is voluntary is "a question of fact to be determined from the totality of all the circumstances." Schneckloth v.

Bustamonte, 412 U.S. 218, 227 (1973). Voluntary consent may not be "coerced, by explicit or implicit means, by implied threat or covert force." Id. at 228.

Defendants have shown there is no evidence in the record of explicit or implicit coercion, threats, or force. Plaintiffs do not identify any such evidence. Plaintiffs did not have to know they could refuse consent in order for the consent to be valid. Id. at 248-49. The consent was voluntarily given. The valid consent waived Plaintiffs' right to object to the search. Id. at 235.

Plaintiffs also contend they were arrested, which precludes voluntary consent. Having found Plaintiffs were not arrested, this argument fails.

D. Injunctive Relief and Nominal Damages

Because Plaintiffs do not prevail on their civil rights claims, injunctive relief and nominal damages are not warranted.

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## III. DISPOSITION

Plaintiffs' motion for summary judgment is DENIED. Defendants' motions for summary judgment are GRANTED.

DATED: January 24, 2005.

/s/
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

**No. SACV 03-386**

**[Filed April 17, 2003]**

**CENTER FOR BIO-ETHICAL REFORM, INC., PAUL KULAS,** and **THOMAS PADBERG,**
Plaintiffs,

v.

**LOS ANGELES COUNTY SHERIFF'S DEPARTMENT ("LACSD"), LEROY D. BACA,** in his official capacity as Sheriff, LACSD, **XAVIER R. AGUILAR,** individually and in his official capacity as Sergeant, LACSD, **DAVE DESPOT,** individually and in his official capacity as Deputy, LACSD, **MARK DARLING,** individually and in his official capacity as Deputy, LACSD, **MARK C. REPCIK,** individually and in his official capacity as Deputy, LACSD, and **ART ROBERTS,** individually and in his official capacity as an administrative official, Dodson Middle School,

Defendants. )
)

**COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF PURSUANT TO 42 U.S.C. § 1983**

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants, their employees, agents, and successors in office, and in support thereof allege the following upon information and belief:

**JURISDICTION**

1. This action arises under the First, Fourth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3).

**INTRODUCTORY STATEMENT**

2. This is a case asserting the fundamental constitutional rights of Plaintiffs. Plaintiffs are pro-life advocates who engage in lawful expressive activity in the State of California and elsewhere to protest abortion and to promote respect for human life. This is a civil rights action challenging the acts of Defendants and the constitutionality of California Penal Code § 626.8 (hereinafter referred to as "Section 626.8") as applied to Plaintiffs' pro-life activities. (A true and correct copy of Section 626.8 is attached to this Complaint as Exhibit A and is incorporated herein by reference). According to Defendants, Section 626.8

prohibits Plaintiffs from engaging in their pro-life activities on the public streets adjacent to a public school.

3. Plaintiffs seek a declaration that Section 626.8, as applied, is unconstitutional and a permanent injunction enjoining its enforcement as applied against Plaintiffs. Plaintiffs seek nominal damages against certain Defendants for the past loss of their constitutional rights. And Plaintiffs seek an award of reasonable costs of litigation, including attorneys' fees and expenses, pursuant to 42 U.S.C. § 1988.

4. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202, by Rules 57 and 65 of the Federal Rules of Civil Procedure, and by the general legal and equitable powers of this Court. Plaintiffs' claim for damages is authorized by 42 U.S.C. § 1983.

5. Plaintiffs' prayer for relief regarding costs, including reasonable attorneys' fees, is authorized by 42 U.S.C. § 1988.

6. Venue is proper under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in this district.

**PLAINTIFFS**

7. Plaintiff Center for Bio-Ethical Reform, Inc. ("CBR"), is a pro-life, California-based, non-profit corporation. It is a section 501(c)(3) organization that is incorporated under the laws of the State of California.

8. Plaintiff Paul Kulas is an adult resident of the State of California and a citizen of the United States. Plaintiff Kulas is a full-time employee of CBR.

9. Plaintiff Thomas Padberg is an adult resident of the State of California and a citizen of the United States. Plaintiff Padberg is a CBR volunteer.

**DEFENDANTS**

10. Defendant Los Angeles County Sheriff's Department ("LACSD") is a public entity capable of being sued. LACSD, through its agents, enforces Section 626.8 throughout the Los Angeles County.

11. Defendant Leroy D. Baca is the Sheriff for LACSD. He is responsible for enforcing Section 626.8. At all relevant times, Defendant Baca was an agent, servant, and/or employee of LACSD, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendant Baca is sued in his official capacity only.

12. Defendant Xavier R. Aguilar is a Sergeant with LACSD. At all relevant times, Defendant Aguilar was an agent, servant, and/or employee of LACSD, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendant Aguilar is sued individually and in his official capacity.

13. Defendant Dave Despot is a Deputy with LACSD. At all relevant times, Defendant Despot was an agent, servant, and/or employee of LACSD, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendant Despot is sued individually and in his official capacity.

14. Defendant Mark Darling is a Deputy with LACSD. At all relevant times, Defendant Darling was an agent, servant, and/or employee of LACSD, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendant Darling is sued individually and in his official capacity.

15. Defendant Mark C. Repcik is a Deputy with LACSD. At all relevant times, Defendant Repcik was an agent, servant, and/or employee of LACSD, acting under color of state law as that phrase is used in 42 U.S.C. § 1983. Defendant Repcik is sued individually and in his official capacity.

16. Defendant Art Roberts is an administrative official at the Dodson Middle School, a public school located in Los Angeles County, California. At all relevant times, Defendant Roberts was an agent, servant, chief administrative official, designated representative of a chief administrative official, and/or employee of the Dodson Middle School, serving a public function, acting jointly and in a symbiotic relationship with Defendants, and acting under color of state law as that phrase is used in 42 U.S.C. § 1983.

## STATEMENT OF FACTS

17. CBR was established in 1990 as a non-profit public policy and advocacy group to promote prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative educational programs. One such educational program is the Reproductive Choice Campaign ("RCC").

18. The RCC consists of large, colorful pictures depicting graphic images of first-term aborted fetuses displayed on the sides of box body style trucks. The pictures on the sides of the trucks are accurately captioned as to age, in weeks since fertilization. True and accurate photographs of an RCC truck are attached to this Complaint as Exhibits B, C, and D.

19. Plaintiffs' pictures are not solicitations or commercial speech; they are political speech. The purpose of this educational program is to expose as many people as possible to the reality of abortion, particularly first-term abortions. The RCC demonstrates to onlookers that abortion is a violent act that results in the killing of innocent human life and is, therefore, contrary to the common good. Plaintiffs express their pro-life message by displaying these pictures in public areas throughout the Los Angeles County and elsewhere.

20. Plaintiffs engage in this educational program on the public streets and public ways adjacent to middle schools and high schools throughout Los Angeles County and elsewhere because there are students at these schools who have either had or are contemplating having an abortion without being informed about the truth or reality of abortion and, in many cases, without informing their parents of their plans to have an abortion or seeking their parents' consent prior to obtaining an abortion. In some cases, students are excused from class, taken to an abortion facility, receive an abortion, and return to class without parental notification or consent. CBR believes that students who are old enough to have an abortion are old enough to see one.

21. On or about March 24, 2003, Plaintiffs were traveling the public streets adjacent to the Dodson Middle School in Los Angeles County, California as part of Plaintiffs' RCC activities. Plaintiff Kulas was driving an RCC truck, which displayed the graphic images of aborted babies. Plaintiff Padberg was driving an escort vehicle, a Ford Crown Victoria sedan. Altogether, two vehicles were involved in Plaintiffs' pro-life speech activity on this day.

22. Plaintiffs commenced their pro-life speech activity on the adjacent public streets of the Dodson Middle School at or about 7:30 a.m. Plaintiffs chose this time because it would ensure the greatest exposure for their pictures.

23. Plaintiffs were driving their vehicles on the public streets adjacent to the Dodson Middle School, circling the area just outside of the school grounds, for approximately thirty minutes when Defendant Darling arrived in his marked police vehicle. Several minutes later, Defendant Repcik arrived in a second marked police vehicle, turned on his flashing lights, and pulled over the Plaintiffs. Both police vehicles pulled up behind the Plaintiffs' vehicles, which had now pulled over to the side of the road. School officials at Dodson Middle School and others had made complaints to LACSD, seeking to prevent Plaintiffs from displaying their graphic pictures.

24. Defendant Darling approached Plaintiff Kulas, who was sitting in the RCC truck, and demanded that he produce his driver's license and exit the vehicle. Plaintiff Kulas asked Defendant Darling why he had been stopped, and Defendant Darling stated, "You are

driving this truck around with graphic images and offensive language and scaring the kids," or words to that effect. Plaintiff Kulas surrendered his driver's license and exited his vehicle as requested.

25. Defendant Repcik approached Plaintiff Padberg and told him that he could charge him with a "sex crime" because displaying the pictures was "child abuse," or words to that effect. Defendant Repcik demanded that Plaintiff Padberg produce his driver's license and exit the vehicle. Plaintiff Padberg complied with the demands.

26. Defendants Darling and Repcik conferred for several minutes and then called for their Sergeant. At approximately 8:45 a.m., Defendant Aguilar arrived in a marked police vehicle. Defendants Darling, Repcik, and Aguilar conferred for several minutes. Defendant Despot then arrived on the scene in a marked police vehicle. It was clear to Plaintiffs that Defendants were devising a way to charge Plaintiffs with a violation of the law.

27. Defendant Despot approached Plaintiffs and asked them questions about the escort sedan. Defendant Despot took several photographs of the sedan. Defendant Repcik then entered the sedan without requesting or receiving permission to do so. Defendant Repcik began searching the sedan and eventually turned on the vehicle's lights.

28. Defendants Repcik and Despot scoured the sedan looking for a violation of the law. They could not find one.

29. Defendant Despot then entered his police vehicle and departed for the Dodson Middle School, returning several minutes later with Defendant Roberts.

30. Defendant Despot escorted Defendant Roberts over to Plaintiffs. Defendant Roberts, who was coached by the Defendant deputies, told Plaintiffs that their pictures were disruptive and that they had to leave the area and not return. Defendant Roberts was willingly working with the other Defendants to achieve the objective of preventing Plaintiffs from displaying their graphic pictures on the public streets adjacent to the Dodson Middle School. Defendant Darling advised Plaintiffs of the content of Section 626.8, reading verbatim portions of this penal code. Defendants told Plaintiffs that they have been informed pursuant to Section 626.8, and they must now leave and not return with their graphic pictures.

31. Because of Defendants' credible threat to enforce Section 626.8, which carries penalties of a fine and imprisonment, Plaintiffs departed the area and will not return to continue their pro-life speech activity.

32. At no time did Plaintiffs come into any school building or upon any of the school grounds of the Dodson Middle School. Plaintiffs' pro-life speech activity was confined to the public streets adjacent to the Dodson Middle School.

33. The Defendants detained Plaintiffs for more than one and a half hours before releasing them.

## STATUTORY FRAMEWORK OF SECTION 626.8

34. Section 626.8 states, in relevant part: "Any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities . . . is guilty of a misdemeanor if he or she does any of the following: (1) Remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by . . . [a] sheriff or deputy sheriff. . . . (2) reenters or comes upon that place within seven days of being asked to leave by a person specified in paragraph (1)."

35. "This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly."

36. "(b) Punishment for violation of this section shall be as follows: (1) Upon a first conviction by a fine of not exceeding five hundred dollars ($500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment."

## FIRST CLAIM FOR RELIEF (Freedom of Speech)

37. Plaintiffs hereby incorporate by reference all above paragraphs.

38. By reason of the aforementioned acts and omissions, engaged in under color of state law, Defendants have unconstitutionally deprived Plaintiffs of their freedom of speech rights guaranteed under the First Amendment to the United States Constitution as applied to the states and their political subdivisions under the Fourteenth Amendment, and 42 U.S.C. § 1983, in that by enforcing and/or applying Section 626.8 against Plaintiffs' pro-life speech activity, Defendants have prevented Plaintiffs from expressing their opposition to abortion in a public forum.

39. By reason of the aforementioned acts and omissions, engaged in under the color of state law, Defendants have also unconstitutionally deprived Plaintiffs of their freedom of speech rights guaranteed to them under the First Amendment to the United States Constitution, as applied to the states and their political subdivisions under the Fourteenth Amendment, and 42 U.S.C. § 1983, in that Defendants, through their acts, policies, practices, and/or customs, unlawfully and unreasonably detained and searched Plaintiffs because of their pro-life speech activity.

40. As a direct and proximate result of Defendants' violation of Plaintiffs' rights, Plaintiffs have suffered direct and irreparable injury, and they are entitled to damages.

**SECOND CLAIM FOR RELIEF**
**(Freedom of Speech Conspiracy)**

41. Plaintiffs hereby incorporate by reference all above paragraphs.

42. By reason of the aforementioned acts and omissions, and policies, practices, and/or customs, engaged in under the color of state law Defendants have conspired to unconstitutionally deprive Plaintiffs of their right to freedom of speech guaranteed under the First Amendment to the United States Constitution as applied to the states and their political subdivisions under the Fourteenth Amendment, and 42 U.S.C. § 1983, in that Defendants agreed to and engaged in overt acts that prevented Plaintiffs from expressing their opposition to abortion in a public forum.

43. As a direct and proximate result of Defendants' violation of Plaintiffs' rights, Plaintiffs have suffered direct and irreparable injury, and they are entitled to damages.

**THIRD CLAIM FOR RELIEF**
**(Unlawful Search and Seizure)**

44. Plaintiffs hereby incorporate by reference all above paragraphs.

45. By reason of the aforementioned acts and omissions, and policies, practices, and/or customs, engaged in under the color of state law, Defendant Repcik unconstitutionally searched Plaintiffs' vehicle and Defendants Aguilar, Despot, Darling, and Repcik unconstitutionally seized Plaintiffs' persons, vehicles, and other property, without a warrant, without probable cause that a crime had been, was being, or would be committed, and without valid consent, and thus deprived Plaintiffs of their rights to be free of unreasonable police searches and seizures, to be free

of warrantless searches and seizures, and to be free of searches and seizures without probable cause, which are guaranteed to them under the Fourth Amendment to the United States Constitution, as applied to the states and their political subdivisions under the Fourteenth Amendment, and 42 U.S.C. § 1983.

46. As a direct and proximate result of Defendants' violation of Plaintiffs' rights, Plaintiffs have suffered direct and irreparable injury, and they are entitled to damages.

**WHEREFORE**, Plaintiffs ask this Court:

A) to enjoin Defendants, their employees, agents, and successors in office from enforcing Section 626.8 as applied against Plaintiffs' pro-life speech activity as described herein;

B) to enter judgment declaring that the application of Section 626.8 to Plaintiffs' pro-life speech activity as described herein violates Plaintiffs' constitutional rights;

C) to award Plaintiffs nominal damages against Defendants Aguilar, Despot, Darling, Repcik, and Roberts in their individual capacities for the past loss of Plaintiffs' constitutional rights;

D) to award Plaintiffs their reasonable attorneys' fees, costs, and expenses pursuant to 42 U.S.C. § 1988 and other applicable law;

E) to grant such other and further relief as this Court should find just and proper.

Respectfully submitted this 11th day of April, 2003.

THOMAS MORE LAW CENTER

By: /s/
Robert J. Muise *
*Subject to admission *pro hac vice*

ASHWORTH, HAYES & MORAN, LLP

By: /s/
James A. Hayes, Jr., Esq.
*Counsel for Plaintiffs*

# EXHIBIT A

**§ 626.8. Disruptive presence at schools; specified sex offenders; offenses; punishment: notification**

(a) Any person who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and whose presence or acts interfere with the peaceful conduct of the activities of the school or disrupt the school or its pupils or school activities, or any specified sex offender who comes into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, unless the person is a parent or guardian of a child attending that school, or is a student at the school or has prior written permission for the entry from the chief administrative officer of that school, is guilty of a misdemeanor if he or she does any of the following:

(1) Remains there after being asked to leave by the chief administrative official of that school or his or her designated representative, or by a person employed as a member of a security or police department of a school district pursuant to Section 39670 of the Education Code, or a city police officer, or sheriff or deputy sheriff, or a Department of the California Highway Patrol peace officer.

(2) Reenters or comes upon that place within seven days of being asked to leave by a person specified in paragraph (1).

(3) Has otherwise established a continued pattern of unauthorized entry.

This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly.

(b) Punishment for violation of this section shall be as follows:

(1) Upon a first conviction by a fine of not exceeding five hundred dollars ($500), by imprisonment in the county jail for a period of not more than six months, or by both the fine and imprisonment.

(2) If the defendant has been previously convicted once of a violation of any offense defined in this chapter or Section 415.5, by imprisonment in the county jail for a period of not less than 10 days or more than six months, or by both imprisonment and a fine of not exceeding five hundred dollars ($500), and shall not be released on probation, parole, or any other basis until he or she has served not less than 10 days.

(3) If the defendant has been previously convicted two or more times of a violation of any offense defined in this chapter or Section 415.5, by imprisonment in the county jail for a period of not less than 90 days or more than six months, or by both imprisonment and a fine of not exceeding five hundred dollars ($500), and shall not be released on probation, parole, or any other basis until he or she has served not less than 90 days.

(c) As used in this section, the following definitions govern the meaning of the following words and phrases:

(1) "Specified sex offender" means any person required to register pursuant to Section 290, who has been convicted of a violation of Section 220, 261, 266, 267, 272, 288, or 289, or of subdivision (c), (d), or (f) of Section 286, or of subdivision (c), (d), or (f) of Section 288a, or of an attempt to commit any of these offenses.

(2) "Lawful business" means a reason for being present upon school property which is not otherwise prohibited by statute, by ordinance, or by any regulation adopted pursuant to statute or ordinance.

(3) "Continued pattern of unauthorized entry" means that on at least two prior occasions in the same school year the defendant came into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, without lawful business thereon, and his or her presence or acts interfered with the peaceful conduct of the activities of the school or disrupted the school or its pupils or school activities, and the defendant was asked to leave by a person specified in paragraph (1) of subdivision (a).

(4) In the case of a specified sex offender, "continued pattern of unauthorized entry" means that on at least two prior occasions in the same school year the defendant came into any school building or upon any school ground, or street, sidewalk, or public way adjacent thereto, and the defendant was asked to leave by a person specified in paragraph (1) of subdivision (a).

(5) "School" means any preschool or school having any of grades kindergarten through 12.

(d) When a person is directed to leave pursuant to paragraph (1) of subdivision (a), the person directing him or her to leave shall inform the person that if he or she reenters the place within seven days he or she will be guilty of a crime.

**EXHIBIT B**

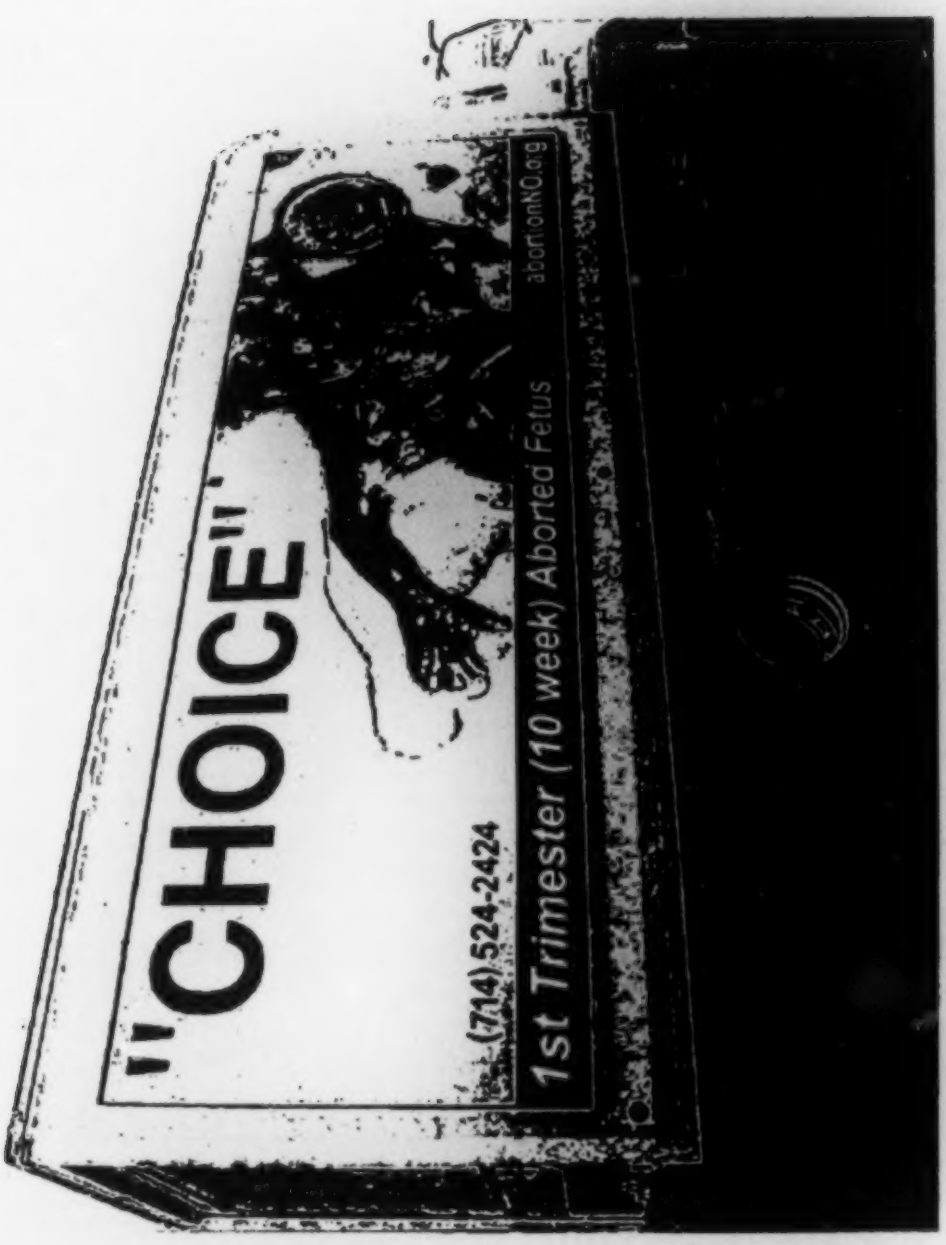


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**EXHIBIT C**

# EXHIBIT D

motto
abortionNO.org | 714-524-2424
CHOICE
abortionNO.org
Aborted Fetus

Supreme Court, U.S.
FILED
NOV 18 2008
OFFICE OF THE CLERK

Nos. 08-424, 08-431

IN THE

# Supreme Court of the United States

LOS ANGELES COUNTY SHERIFF'S DEPARTMENT, *ET AL.*,
*Petitioners*,

v.

CENTER FOR BIOETHICAL REFORM, *ET AL.*,
*Respondents.*

ART ROBERTS,
*Petitioner*,

v.

CENTER FOR BIOETHICAL REFORM, *ET AL.*,
*Respondents.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit*

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

This case does not meet the requirements for review based on the criteria for granting certiorari. The law prohibiting content-based restrictions on political speech in a traditional public forum is well established, as is the law regarding Fourth Amendment seizures. The Ninth Circuit's unanimous decision properly applied this well settled law to the facts presented. *See* Sup. Ct. R. 10 (noting, for example, that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law"). Consequently, this is not the type of case that is ripe for this Court to review, and Petitioners' claim of a conflict with this Court's precedent is illusory. In the final analysis, disturbing the Ninth Circuit's opinion will have the deleterious effect of eroding well established constitutional protections afforded all law abiding citizens.

1. Whether government officials can impose a *content-based* restriction on a private, adult citizen's peaceful, silent, and non-obstructive political speech in a traditional public forum simply because the forum is adjacent to a public school.

2. Whether it was clearly established in March 2003 that law enforcement officers who conducted a *Terry* stop that revealed no evidence of criminal activity within the first few minutes of the detention, yet detained law-abiding citizens for seventy-five minutes while the officers tried to find some *legal* basis for charging the citizens with a crime could face civil liability for violating the Fourth Amendment.

## RULE 29.6 DISCLOSURE

None of the Respondents in this action has a parent corporation or any stock owned by publicly held corporations.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

RULE 29.6 DISCLOSURE ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... vi

INTRODUCTION ..... 1

STATEMENT OF THE CASE ..... 1

A. Respondents Were Engaging in Peaceful, Silent, and Non-Obstructive Political Speech in a Traditional Public Forum. ..... 1

B. There Was No "Material Disruption" or "Substantial Disorder" at the School. ..... 3

C. Petitioners Employed a Content-Based Restriction to Silence Respondents' Political Speech. ..... 5

D. LACSD Petitioners Seized Respondents for Seventy-Five Minutes in order to "Fish" for a Crime. ..... 8

E. The Loss of Respondents' First Amendment Rights Caused Irreparable Harm. ..... 9

REASONS FOR DENYING THE PETITION .... 9

I. Petitioners' Content-Based Restriction on Respondents' Political Speech Violated Fundamental and Long-Standing Principles of First Amendment Jurisprudence. . . . . 9

A. Student Speech Regulations Do Not Justify Petitioners' Restriction on Respondents' Political Speech. . . . . 11

B. The School Setting Here Provides No Basis for Petitioners' Content-Based Restriction on Respondents' Political Speech. . . . . 15

C. Petitioners' Restriction on Respondents' Political Speech Offends Well Established Principles of First Amendment Jurisprudence. . . . . 17

1. Content-based restrictions are prohibited. . . . . 17

2. The government cannot empower the "heckler." . . . . 20

3. The government may not reduce the adult population to viewing only what is fit for children. . . . . 22

II. Petitioner's Application of § 626.8 Is Contrary to the Will of the California Legislature. . . . . 24

III. LACD Petitioners' Seventy-Five Minute Detention Violated Respondents' Clearly Established Right To Be Free from Unreasonable Government Seizures. .... 25

A. Qualified Immunity Does Not Excuse LACSD Petitioners' Prolonged Detention. ..... 25

B. Respondents' Fourth Amendment Right To Be Free from LACSD Petitioners' Unreasonable Seizure Was Clearly Established. ..... 27

CONCLUSION ..... 29

## TABLE OF AUTHORITIES

### CASES

*Berkemer v. McCarty*,
468 U.S. 420 (1984) ..... 27

*Bethel Sch. Dist. v. Fraser*,
478 U.S. 675 (1986) ..... 12

*Bolger v. Youngs Drug Products Corp.*,
463 U.S. 60 (1983) ..... 22

*Boos v. Barry*,
485 U.S. 312 (1988) ..... 18

*Braxton v. Municipal Court*,
514 P.2d 697 (Cal. 1973) ..... 19, 20

*Brown v. Louisiana*,
383 U.S. 131 (1966) ..... 20, 21

*Butler v. Michigan*,
352 U.S. 380 (1957) ..... 22

*Centanni v. Eight Unknown Officers*,
15 F.3d 587 (6th Cir. 1994) ..... 27

*Cohen v. California*,
403 U.S. 15 (1971) ..... 18, 21, 22, 23

*Edwards v. South Carolina*,
372 U.S. 229 (1963) ..... 18

*Erznoznik v. City of Jacksonville*,
422 U.S. 205 (1975) ..... 18, 22

*Forsyth County v. Nationalist Movement*,
505 U.S. 123 (1992) ..... 18

*Frisby v. Schultz*,
487 U.S. 474 (1988) ..... 10

*Glasson v. Louisville*,
518 F.2d 899 (6th Cir. 1975) ..... 21

*Grayned v. City of Rockford*,
408 U.S. 104 (1972) ..... *passim*

*Hague v. CIO*,
307 U.S. 496 (1939) ..... 10

*Hazelwood v. Kuhlmeier*,
484 U.S. 260 (1980) ..... 12

*Hedges v. Wauconda Comty. Unit Sch. Dist. No. 118*,
9 F.3d 1295 (7th Cir. 1993) ..... 21

*Hill v. Colorado*,
530 U.S. 703 (2000) ..... 9

*Morse v. Frederick*,
127 S.Ct. 2618 (2007) ..... 13, 14

*NAACP v. Claiborne Hardware Co.*,
458 U.S. 886 (1982) ..... 10

*Reno v. ACLU*,
521 U.S. 844 (1997) ..... 19, 23

*Rosenberger v. Rector & Visitors of the Univ. of Va.*,
515 U.S. 819 (1995) ..... 18

*Schneider v. New Jersey*,
308 U.S. 147 (1939) ..... 10, 11

*Terminiello v. City of Chicago*,
337 U.S. 1 (1949) ..... 18

*Texas v. Johnson*,
491 U.S. 397 (1989) ..... 18

*Tinker v. Des Moines Indep. Sch. Dist.*,
393 U.S. 503 (1969) ..... 14, 15

*United States v. Butler*,
223 F.3d 368 (6th Cir. 2000) ..... 27

*United States v. Chamberlin*,
644 F.2d 1262 (9th Cir. 1980) ..... 28

*United States v. Chavez-Valenzuela*,
268 F.3d 719 (9th Cir. 2001), *amended by*
279 F.3d 1062 (2002) ..... 29

*United States v. Lopez-Soto*,
205 F.3d 1101 (9th Cir. 2000) ..... 26

*United States v. Mendenhall*,
446 U.S. 544 (1980) ..... 27

*United States v. Richards*,
500 F.2d 1025 (9th Cir. 1974) ..... 28

*United States v. Richardson*,
949 F.2d 851 (6th Cir. 1991) ..... 27

*United States v. Sharpe*,
470 U.S. 675 (1985) ..... 28

*United States v. Tibbetts*,
396 F.3d 1132 (10th Cir. 2005) ..... 26

**STATUTES**

Cal. Penal Code § 626.8 ..... *passim*

## INTRODUCTION

This is a single response to the petitions filed by Petitioners Los Angeles County Sheriff's Department, Xavier Aguilar, Dave Despot, Mark Darling, and Mark Repcik ("LACSD Petitioners") (case no. 08-424) and Petitioner Art Roberts (case no. 08-431) (collectively referred to as "Petitioners").

Stripped of the histrionics and hyperbole, Petitioners' arguments invite this Court to disregard decades of well established First Amendment principles and precedent by declaring the public streets and sidewalks adjacent to public schools off limits for speech that government officials find offensive. *But see Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) ("[T]he public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public."). This Court should decline the invitation and deny the petitions.

## STATEMENT OF THE CASE

### A. Respondents Were Engaging in Peaceful, Silent, and Non-Obstructive Political Speech in a Traditional Public Forum.

Respondents are members of the Center for Bio-Ethical Reform, which is a non-profit organization whose main purpose is to promote "prenatal justice and the right to life for the unborn, the disabled, the infirm, the aged, and all vulnerable peoples through education and the development of innovative

educational programs." App. at 4a.[1] One such program is the "Reproductive Choice Campaign," which seeks to "expose as many people as possible to the reality of abortion" by displaying large, graphic photographs of first-term aborted fetuses on the sides of trucks as they drive the public streets. App. at 4a. Respondents' photographs present a visual message that is rhetorically inexpressible. This visual message is Respondents' speech. *See* App. at 5a ("[Y]ou can't teach inexpressively horrific historical fact in exclusive reliance on the written or spoken word.").

On March 24, 2003, Respondents were driving their vehicles and displaying their political message on the public streets adjacent to the Dodson Middle School while students and faculty were arriving prior to the start of the school day.[2] App. at 6a, 11a-12a, n.3. Respondents commenced their speech activity at about 7:30 a.m. ER-63, 106, 130, 135, 140-41, 274.[3] Classes do not begin until 8:01 a.m.[4] App. at 7a; ER-274.

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[1] The citations refer to the appendix included in the petition filed by LACSD Petitioners.

[2] Consequently, Respondent's audience consisted of faculty, parents, students, commuters, pedestrians, and residents of the neighborhood where the school is located. The school contains grades 6 through 8 (the *typical* age range for these grades is 11 to 14 years old) and serves approximately 2,000 students.

[3] "ER" refers to Respondents' Excerpts of Record filed in the Ninth Circuit.

[4] Respondents drove their vehicles for approximately 30 minutes prior to being detained by Petitioners. ER-106, 328. The only reason why Respondents remained in the vicinity of the school

While engaging in their speech activity, Respondents were obeying all of the applicable laws. They were not obstructing or blocking anyone's passage, not causing or creating any traffic accidents or other traffic related problems, not making any loud or disturbing noises, and not violating any traffic code provisions.[5] ER-62-63, 66, 68-70, 97-98, 167-68, 176-80, 216-17, 227-29.

At no time on March 24, 2003, did Respondents come into any school building or upon any of the school grounds; Respondents' speech activity was confined to the public streets. At no time did Respondents use any sound equipment or sound amplification devices. At no time did Respondents block, obstruct, or impede in any way anyone's use of or access to any of the public streets, public ways, or entrances to the school. At all times Respondents were acting peacefully. And at all times Respondents were driving carefully, obeying the posted speed limits and other applicable traffic regulations. ER-66, 167-70, 216-17.

### B. There Was No "Material Disruption" or "Substantial Disorder" at the School.

There was no "material disruption" or "substantial disorder" at the Dodson Middle School on March 24, 2003. While the content of Respondent's political message may have been "disruptive" to some, on this day students were arriving at school in an orderly

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beyond the time when classes began was because LACSD Petitioners wouldn't allow them to leave.

[5] *See also* the video evidence provided in the DVD that was lodged with the district court. ER-169-70.

manner. Some students looked at Respondents' pictures and turned away, continuing on with their business, other students did not bother to look. ER-87, 88, 97, 98, 169-70. Classes at the school started and ended on time, the schedule of the day did not change, and no classes were canceled.[6] ER-278, 313; *see also* App. at 7a.

Petitioner Art Roberts, the assistant principal, testified as follows:

> Q. At 8:01 did you have all the students in the campus on March 24th, 2003?
> THE WITNESS: We had a fairly normal opening.
> BY MR. MUISE:
> Q. What does that mean?
> A. That means that there was *some disruption*, but despite that we had a *fairly normal opening*.

ER-312 (emphasis added); *see also* App. at 7a (finding that the school had a "fairly normal opening" and that the students "were on the campus by the start of classes at 8:01 a.m.").

None of the LACSD Petitioners who were present at the school on March 24, 2003, observed any disruption or disturbance caused by Respondents, including Petitioner Mark Darling, who closely followed Respondents as they drove on the public

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[6] Petitioner Roberts notes "that school started at 8:01 a.m., on schedule, with students in their classrooms," grudgingly conceding that there was no "material" or "substantial" disruption or disorder caused by Respondents' speech activity. *See* Roberts Pet. at 20.

streets past the school. ER-163-64, 176-80, 221, 231-32, 288-89.

### C. Petitioners Employed a Content-Based Restriction to Silence Respondents' Political Speech.

In response to a complaint from school officials,[7] LACSD Petitioners stopped and detained Respondents for at least seventy-five minutes, during which time Respondents were not free to leave. ER-181-82, 189, 205-06, 218, 335. Respondents were stopped, detained, and eventually told to leave because of the reaction that a few people were having to Respondents' pictures. ER-111-12, 195-98, 217, 228-29, 286. Petitioners invoked California Penal Code § 626.8 as the authority to stop Respondents' political speech. ER-65-66, 299, 304.

Petitioner Darling testified as follows:

> Q. During that time that you were following those vehicles, during that five-minute period of time, was there anything that you observed that would lead you to believe that [Respondents] were in violation of § 626.8?
> A. Yes.
> Q. And what was that?

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[7] School officials were responding to complaints from a few parents and neighbors. ER-302-03. The official complaint stated, in relevant part, "'Anti-abortion' truck with offensive language/pictures is circling the school . . . ." App. at 7a; *see also* ER-268 (describing Respondents' vehicle in an incident report as "a truck with anti-abortion propaganda/pictures").

> A. Due to the nature of the graphic pictures on the sides of the panel truck.
> Q. And what is it about the nature of the pictures?
> A. They're just very graphic and kind of in your face of an unborn aborted fetus.

ER-196.

At the time they detained Respondents, LACSD Petitioners knew that Respondents' purpose was to make a political statement. ER-155, 156, 192, 220, 223-24, 226; *see also* ER-237-42, 268. That is, they knew that Respondents were exercising their right to freedom of speech. Nevertheless, Petitioners invoked § 626.8 to prohibit Respondents' speech despite the fact that this penal code section expressly states that it "shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly." ER-52, 165-66, 290-91; App. at 64a.

Petitioner Darling testified as follows:

> Q. Did you understand that what they were doing was demonstrating their view regarding abortion?
> A. Yes.

ER-192.

Testimony of the LACSD Petitioners further demonstrates that Respondents were stopped and detained because of the content of their political message and certain viewers' reactions to this message.

Petitioner Mark Repcik testified as follows:

> Q. So then, is it your understanding that the disruption was a reaction to what Respondents were doing?
> A. Yes.
> Q. And in this case, is it your understanding that the reaction was to the graphic pictures that were on the sides of the truck?
> A. Yes.

ER-228-29.

Similarly, Petitioner Darling testified as follows:

> Q. Is it fair to say that, at the time, you didn't have any concern with what was inside the truck but what was on the outside of the truck?
> A. Yes.
> Q. And that being the pictures they referred to?
> A. Yes.

ER-198.

During the detention, LACSD Petitioners escorted Petitioner Roberts over to Respondents, and Roberts told Respondents that their pictures were disruptive and that they had to leave the area. Petitioners advised Respondents of the content of § 626.8, reading verbatim portions of this penal code. Petitioners told Respondents that they have been informed pursuant to § 626.8, and they must now leave and not return with their pictures. ER-65, 66, 299, 328.

Consequently, Respondents' "speech was permitted until the students and drivers around the school

reacted to it, at which point the speech was deemed disruptive and ordered stopped under § 626.8." App. at 16a.

### D. LACSD Petitioners Seized Respondents for Seventy-Five Minutes in order to "Fish" for a Crime.

Based on the testimony of LACSD Petitioners, it takes only several minutes to run a check on a person's driver's license and vehicle registration for warrants or any other suspicious or criminal activity. ER-183-85, 209-12. LACSD Petitioners determined at the beginning of the stop that Respondents were expressing their view in opposition to abortion. ER-192, 242-45, 268, 270. Nevertheless, the detention lasted at least seventy-five minutes. ER-335.

As the record shows, not only did LACSD Petitioners not witness any disruption caused by Respondents, they also did not make a "quick" investigation of the veracity of the complaint from the school officials. LACSD Petitioners did not speak to a school official until more than one hour into the detention. ER-109-10; *see also* ER-161. And this "wasn't much of a conversation," according to Petitioner Roberts, the school official they spoke to. ER-314.

Accordingly, the record reveals no justifiable explanation for why it took seventy-five minutes to investigate the relevant facts. App. at 28a-32a. As the Ninth Circuit concluded, "neither California Penal Code § 626.8 nor the search for other code provisions that might have been violated justified the Deputy Sheriffs in detaining [Respondents] for seventy-five

minutes while the sheriffs tried to find some basis for charging them." App. at 32a.

### E. The Loss of Respondents' First Amendment Rights Caused Irreparable Harm.

Because of Petitioners' enforcement of § 626.8, which carries penalties of a fine and imprisonment, and Petitioners' order to leave the surrounding public streets and not return with their pictures, Respondents departed and will not return to continue their speech activity. ER-136-39, 88; *see also* ER-161, 193, 255, 293.

## REASONS FOR DENYING THE PETITION

In its decision, the Ninth Circuit applied established law to the undisputed facts and reached a decision that is consistent with this Court's jurisprudence. Consequently, there is no conflict with this Court's precedent, nor does this case call for a departure from it. Indeed, departing from these well established principles of constitutional law will have the deleterious effect of eroding fundamental constitutional rights.

### I. Petitioners' Content-Based Restriction on Respondents' Political Speech Violated Fundamental and Long-Standing Principles of First Amendment Jurisprudence.

The First Amendment plainly protects Respondents' use of pictures to publicly express their political message in traditional public fora. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 714-15 (2000) (recognizing that petitioners' "leafletting, sign

displays, and oral communications are protected by the First Amendment"). And this Court "has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.'" *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (citations omitted).

Moreover, this Court has long recognized that all public streets are properly considered traditional public fora. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting that "all public streets are held in the public trust and are properly considered traditional public fora"). Public streets "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). This Court has emphasized that "the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

Contrary to the arguments advanced by Petitioners, the public streets adjacent to the Dodson Middle School are no exception. They too are a traditional public forum for the purposes of Respondents' speech activity. *See Grayned*, 408 U.S. at 118 ("[T]he public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public.").

Consequently, the public forum doctrine gives meaning and effect to the command of the First Amendment by protecting Respondents' speech even if it is expressed on public streets adjacent to a school. *See, e.g., Schneider*, 308 U.S. at 163; *Grayned*, 408 U.S. at 115, 120 (upholding an anti-noise ordinance against a facial challenge, but noting that the "government has no power to restrict [speech] activity because of its message" and noting that the ordinance "gives no license to punish anyone because of what he is saying").

In the final analysis, Respondents' political speech in a traditional public forum must be accorded the greatest protection under the First Amendment. In this case, however, Petitioners are asking this Court to criminalize Respondents' peaceful, silent, and non-obstructive political speech because of the reaction of a few "listeners" (i.e., viewers) to the content of Respondents' message. This Court should reject Petitioners' efforts to undermine bedrock principles of the First Amendment.

### A. Student Speech Regulations Do Not Justify Petitioners' Restriction on Respondents' Political Speech.

Although the government has an interest in maintaining an orderly classroom environment in its public schools, it does not follow that the public streets adjacent to these schools are places in which the government can eviscerate the First Amendment and its protections, particularly for non-students. Moreover, local school rules and regulations that prohibit certain student speech within the school and in the classrooms do not implicate the same level of

First Amendment protection afforded to private citizens engaging in silent, peaceful, and non-obstructive political speech in a traditional public forum.[8] The two forums are not comparable.

LACSD Petitioners quote *Hazelwood v. Kuhlmeier*, 484 U.S. 260, 266 (1980), for the proposition that "[t]he First Amendment rights applicable to schools 'are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment.'" LACSD Pet. at 14. However, the relied upon quote reads more fully as follows: "[T]he First Amendment rights *of students in the public schools* are not automatically coextensive with the rights of adults in other settings." *Id.* (internal quotations and citation omitted) (emphasis added). Thus, the fact that school officials might create certain rules and regulations that limit student expression in the public schools does not mean that they have similar authority to limit the rights of adults to engage in peaceful, silent, and non-obstructive political expression in a traditional public forum that happens to be adjacent to a school. *Cf. Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986) (upholding a school district's sanctions upon a student in response to his offensively lewd and indecent speech

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[8] Additionally, state and local laws that regulate activity in and around schools cannot trump the rights secured by the First Amendment. Petitioners seek to employ various provisions of the California Education Code and the California Penal Code to make "unlawful" Respondents' political speech. *See* LACSD Pet. at 24-25. These efforts must fail. This is particularly so considering the fact that the statute Petitioners chose to invoke expressly states that it cannot be used to restrict the rights of freedom of speech. *See* Cal. Penal Code § 626.8; App. at 64a.

given at a school assembly, but noting, "If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate").

LACSD Petitioners' reliance on this Court's recent decision in *Morse v. Frederick*, 127 S.Ct. 2618 (2007), is similarly misguided. *See* LACSD Pet. at 19-20, 22. In *Morse*, this Court was asked to decide "whether a principal may, consistent with the First Amendment, restrict student speech *at a school event*, when that speech is reasonably viewed as promoting illegal drug use." *Id.* at 2625 (emphasis added). The Court concluded that "she may." *Id.* What is significant about the Court's decision for purposes of this case, however, is that *Morse* affirmed that student speech, unlike a private, adult citizen's speech in a public forum, is treated differently—although, not that differently so as to completely erode the First Amendment. *See id.* at 2629 (refusing to adopt a rule that would permit the suppression of "offensive" speech and noting that "much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use"). As Justice Alito, joined by Justice Kennedy, noted in his concurring opinion, the Court's decision in *Morse* "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue. . . ." *Id.* at 2636. Justice Alito further observed that "[t]he opinion of the Court does not endorse the broad argument . . . that the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission,'"

*id.* at 2637, noting that he regards the restriction upheld in *Morse* "as standing at the far reaches of what the First Amendment permits," *id.* at 2638.

Unlike *Morse*, the case before this Court addresses the question of whether the government can impose a content-based restriction on a private, adult citizen's peaceful, silent, and non-obstructive political speech that takes place on the public streets, a quintessential public forum. The answer based on *Morse* is a resounding "no."

Consequently, Petitioners' reliance on cases involving student speech on school grounds or during school-sponsored activities and school events is misplaced.

Indeed, in *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969), the landmark case establishing a student's constitutional right to freedom of speech, this Court made an emphatic point that is most appropriate here:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national

> strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[9]

*Id.* at 508-09 (citation omitted).

### B. The School Setting Here Provides No Basis for Petitioners' Content-Based Restriction on Respondents' Political Speech.

This Court should reject Petitioners' request to make public fora adjacent to public schools "First-Amendment-free zones." *See* LACSD Pet. at 14-26 (suggesting a "school exception" for First Amendment rights); *see also* Roberts Pet. at 21-25. In that regard, Petitioners' reliance on *Grayned v. City of Rockford*, 408 U.S. 104 (1972), is misplaced. *See* LACSD Pet. at 11, 16-18; Roberts Pet. at 19-21. As the Ninth Circuit observed, the focus of *Grayned* was on "*classroom* interruption" and "*Grayned* noted with approval that the ordinance did not restrict expressive activity before or after the school session, while the student/faculty audience enters and leaves the school—*the precise situation presented here.*" App. at 11a-12a, n.3 (internal quotations and citation omitted) (emphasis added). Accordingly, the Ninth Circuit appropriately held that "[t]he school setting here thus provides no

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[9] *Tinker* effectively forecloses Petitioner Roberts' request that school officials be granted the power to exercise what is effectively a prior restraint on speech in a traditional public forum so that the officials might "*prevent*" the potential "misconduct" of miscreant and heckling students from reaching a "tipping point." Roberts Pet. at 20 (emphasis added).

authority to engage in otherwise impermissible restrictions." App. at 11a-12a, n.3.

*Grayned*, however, is instructive in this sense: it makes plain that content-based restrictions on peaceful, silent, and non-obstructive political speech occurring in a public forum adjacent to a public school are prohibited. *Compare* Roberts Pet. at 19-21. The First Amendment permits no exception—and for good reasons, as discussed further in section C below.

At issue in *Grayned* was a city anti-noise ordinance that prohibited a person while on school grounds adjacent to a building in which a school was in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session. This Court rejected the facial challenge, holding that the ordinance was a valid content-neutral, time, place, and manner regulation of expressive activity. *See id.* at 115. The time, place, and manner examples this Court cited in upholding the ordinance illustrate the basis for its decision and demonstrate the infirmity of Petitioners' arguments here. In *Grayned*, this Court cited the following content-neutral regulations of speech: preventing two parades from marching on the same street simultaneously; prohibiting a demonstration or parade on a large street during rush hour because it would burden the flow of traffic; turning down the volume of overamplified loudspeakers that assault the citizenry; preventing violent demonstrations in public places; and allowing a silent vigil in a public library, but prohibiting someone from making a speech in the reading room. *See id.* at 115-16. Each of these examples deals with an aspect of expressive activity

unrelated to its message, as the Constitution demands.[10]

More fundamentally, the "material disrupt[ion]" and "substantial disorder" that concerned this Court in *Grayned* was "boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse." *Id.* at 119. Clearly, the silent, peaceful, and non-obstructive political speech at issue here does not meet the "material disruption" or "substantial disorder" criteria necessary to restrict such activity in the first instance, particularly when the First Amendment prohibits the government from "punish[ing] anyone because of what he is saying." *See id.* at 119-20; *see also* App. at 11a-12a, n.3.

### C. Petitioners' Restriction on Respondents' Political Speech Offends Well Established Principles of First Amendment Jurisprudence.

#### 1. Content-based restrictions are prohibited.

It is a settled principle of law that Petitioners cannot restrict Respondents' political speech on

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[10] As these examples demonstrate, Petitioner Roberts misapprehends the distinction between a content-based speech regulation and one that is content-neutral. *See* Roberts Pet. at 17-18. The aspect of Respondents' speech activity that drew offense, and thus the restriction by government officials, was the content of the pictures. There is no escaping that established fact. Consequently, Petitioner Roberts' attempt to cast the restriction as a regulation on the "manner" of speech is unavailing.

content-based criteria. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."). Similarly, it is a clearly established principle of First Amendment jurisprudence that a viewer's reaction to speech is not a content-neutral basis for regulating the speech. *See Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (noting that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949) (holding that speech may not be punished because it "stirred people to anger, invited public dispute, or brought about a condition of unrest"); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views."); *Grayned*, 408 U.S. at 120 (upholding city's anti-noise ordinance that regulated disturbances caused near schools and noting that the ordinance "gives no license to punish anyone because of what he is saying"); *Boos v. Barry*, 485 U.S. 312, 321 (1988) ("The emotive impact of speech on its audience is not a 'secondary effect.'") (opinion of O'Connor, J.); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."); *Cohen v. California*, 403 U.S. 15, 26 (1971) (noting that forbidding particular words would run the substantial risk of suppressing unpopular views in the process); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression

of an idea simply because society finds the idea itself offensive or disagreeable.").

Criminalizing Respondents' speech because their pictures were "disturbing" or causing a reaction in certain viewers, as Petitioners sought to do in this case, is not a content-neutral basis for regulation. Indeed, the First Amendment knows no heckler's veto. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 880 (1997) (holding that a certain provision of the Communications Decency Act was unconstitutional because "[i]t would confer broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech").

In a similar case, the California Supreme Court eloquently conveyed the essence of the First Amendment issue at stake here. In *Braxton v. Municipal Court*, 514 P.2d 697 (Cal. 1973), a case in which the state's highest court was asked to consider the constitutionality and construction of a California criminal statute that prohibited any person from "willfully disrupt[ing] the orderly operation of [a school] campus or facility," the court stated:

> [N]either the "content" of speech nor freedom of association can be restricted merely because such expression or association disrupts the tranquility of a campus or offends the tastes of school administrators or the public. Protest may disrupt the placidity of the vacant mind just as a stone dropped in a still pool may disturb the tranquility of the surface waters, but the courts have never held that such "disruption" falls outside the boundaries of the First Amendment.

*Id.* at 701. (construing the statute "to condemn unlawful disruptive, coercive conduct, not free expression").[11]

### 2. The government cannot empower the "heckler."

Petitioners misapprehend the concept of the "heckler's veto" and why it is so antithetical to the First Amendment. *See* LACSD Pet. at 14-15; *see also* 24-26; Roberts Pet. at 21-25. It is without question that the alleged "disturbance" attributed to Respondents was caused by the reaction that certain viewers were having to Respondents' speech. Petitioners admit as much. The proper, and constitutional, response, however, to such a "disturbance" is not to silence the speaker (i.e., empower the heckler), but to punish those who are reacting improperly (e.g., cite the drivers who are not obeying the traffic laws and punish the students who are disobeying the teacher, etc.).[12] *See Brown v.*

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[11] This case demonstrates that the Ninth Circuit was correct in holding that the California courts would construe § 626.8 so as *not* to apply to Respondents' speech, contrary to the arguments presented by Petitioner Roberts. *See* Roberts Pet. at 14.

[12] Indeed, Petitioner Roberts' exaggerated claim that "[t]he Ninth Circuit's opinion, if upheld, will wreak havoc in the administration of public schools," Roberts Pet. at 13, is less a commentary on the Ninth Circuit's decision than it is an indictment of the apparent inefficacy of school administrators. Nevertheless, school administrators can and always have been able "to invoke a reasonable time, place and manner restriction on disruptive speech adjacent to their schools." Roberts Pet. at 13. However, these government officials do not get a "hallway pass" that excuses them from the proscriptions of the First Amendment.

*Louisiana*, 383 U.S. 131, 133, n.1 (1966) ("Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."); *Glasson v. Louisville*, 518 F.2d 899, 906 (6th Cir. 1975) ("A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas. Instead, he must take reasonable action to protect . . . persons exercising their constitutional rights.") (emphasis added); *see also Hedges v. Wauconda Comty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993) (stating, "the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto"). Otherwise, the government "would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21.

In sum, it is utterly disingenuous for LACSD Petitioners to claim that the Ninth Circuit's ruling has somehow prevented them from performing their duties as law enforcement officers in a responsible fashion. *See* LACSD Pet. at 18, 23. Indeed, not *one* LACSD Petitioner took *any* legitimate step to ensure the safety of the students, seriously negating any claim that this was a significant issue. If LACSD Petitioners were so concerned about traffic and safety, they would have used their lawful authority to direct traffic and to protect the students from reckless or careless drivers, which, in turn, would have also protected Respondents and their free speech rights. Instead, Petitioners

empowered the hecklers and suppressed the speaker, which the First Amendment prohibits.

### 3. The government may not reduce the adult population to viewing only what is fit for children.

In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975), this Court expressed a fundamental rule of constitutional law that is controlling in this case: "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that [the government] thinks unsuitable for them." *Id.* at 213.

In its decisions, this Court has repeatedly affirmed the principle that the government may not "reduce the adult population . . . to [viewing] only what is fit for children." *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (holding unconstitutional a ban on the sale to adults of books deemed harmful to children); *see also Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 73-75 (1983) (holding unconstitutional a ban on mailing of unsolicited advertisements for contraceptives and noting, "[R]egardless of the strength of the government's interest" in protecting children, "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox").

In *Cohen v. California*, 403 U.S. 15 (1971), this Court reversed the conviction of a defendant who walked through a courthouse corridor—a place where *children*, among others, were present—wearing a jacket bearing the words "F*ck the Draft." In its

decision, the Court noted that rather than censoring the speaker, the burden rests with the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[13] *Id.* at 21. As the Court cogently stated, "[W]e cannot indulge the facile assumption that one can forbid particular words [or pictures, as in this case] without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words [or pictures] as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

And in *Reno v. ACLU*, 521 U.S. 844, 880 (1997), this Court held that the prohibition on knowingly communicating indecent material to minors in Internet forums was invalid because it conferred "broad powers of censorship, in the form of a 'heckler's veto,' upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old-child . . . would be present." Similarly, in this case, Petitioners are inviting this Court to confer broad powers of censorship upon any parent, school administrator, or neighbor who opposes Respondents' political message by simply claiming that certain children are offended. This Court should reject the invitation.

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[13] Petitioner Roberts' claim that the students arriving at the school are a "captive" audience is nonsense. *See* Roberts Pet. at 22-25. The public streets adjacent to the school covered a large area, a significant portion of the streets are not visible from the school campus, and Respondents were traveling along the streets with many other vehicles. Thus, if any student wanted to avoid looking at the truck with the pictures, the student could have simply "averted his or her eyes," as the Constitution requires.

## II. Petitioner's Application of § 626.8 Is Contrary to the Will of the California Legislature.

It was the reasoned and considered judgment of the California legislature, which was no doubt aware of the state's interest in maintaining an orderly classroom environment, that § 626.8 should not be employed in the manner in which Petitioners employed it here: to prohibit Respondents' right to freedom of speech. No law degree or crystal ball is needed to divine the intentions of the legislature (or the proper application of the law in this case), *see* LACSD Pet. at 33; it was made explicit in the very statute relied upon by Petitioners, which states, "This section shall not be utilized to impinge upon the lawful exercise of constitutionally protected rights of freedom of speech or assembly." Cal. Penal Code § 626.8; App. at 64a.

Consequently, Petitioners are seeking authority from this Court to circumvent the will of the legislature by upholding the improper and arbitrary application of this statute. Such arbitrary enforcement leads to significant constitutional problems. As demonstrated here, § 626.8 was being used to "delegate[] basic policy matters" to government officials "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *See Grayned*, 408 U.S. at 108-09. Petitioners' misuse of this statute to silence "offensive" or "disturbing" political speech inevitably forces citizens, such as Respondents, to "steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Id.* (internal quotations and ellipsis omitted).

In the final analysis, Petitioners are asking this Court to grant them the authority to enforce a California penal statute in a manner that the California legislature would not allow. This request must be denied.

## III. LACD Petitioners' Seventy-Five Minute Detention Violated Respondents' Clearly Established Right To Be Free from Unreasonable Government Seizures.

### A. Qualified Immunity Does Not Excuse LACSD Petitioners' Prolonged Detention.

LACSD Petitioners argue that they should be excused from any Fourth Amendment liability on qualified immunity grounds because the law at the time of the prolonged detention was unclear and because they faced novel circumstances. LACSD Pet. at 27-33. They are mistaken.

As an initial matter, the Ninth Circuit held that LACSD Petitioners had qualified immunity with regard to Respondent's *First Amendment* claim because, according to the court, under the present circumstances, "we cannot conclude that the law was sufficiently clear that a reasonable officer would know that it was unlawful to request [Respondents] to cease driving their truck around the area." App. at 27a.

However, because LACSD Petitioners enjoy qualified immunity on the First Amendment claim does not excuse their conduct with regard to Respondents' Fourth Amendment claim.

As the record reveals, any suspicion on the part of LACSD Petitioners that Respondents had violated a provision of the California Vehicle Code was dispelled within minutes. The record shows that LACSD Petitioners searched Respondents' vehicles, questioned Respondents, and checked for any outstanding warrants all within the first minutes of the detention, revealing no evidence of a crime. And the relevant section of the California Penal Code cited by LACSD Petitioners only makes it a crime for Respondents to remain in the vicinity of the school once they are asked to depart. However, Respondents "were not asked to leave until the *end* of the seventy-five minute detention, at which point they promptly left. So, with respect to § 626.8, the officers *at no time* had any reason to suspect that [Respondents] had committed or were about to commit this crime." App. at 30a.

Thus, the evidence shows that LACSD Petitioners' prolonged detention of Respondents was not so that they could investigate Respondents for possible criminal wrongdoing. "Instead, [LACSD Petitioners] continued to detain [Respondents] because they were waiting for their supervisors to help them figure out *whether* any crime had been committed." App. at 31a.

As the Ninth Circuit noted, "an officer's uncertainty about the law cannot excuse the detention. To permit otherwise 'would remove the incentive for police to make certain that they properly understand the law that they are entrusted to enforce.'" App. at 31a (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000)); *see also United States v. Tibbetts*, 396 F.3d 1132, 1138 (10th Cir. 2005) ("[F]ailure to understand the law by the very person charged with enforcing it is *not* objectively reasonable.").

In sum, qualified immunity does not erect a shield of ignorance that protects LACSD Petitioners from liability for engaging in a prolonged "fishing expedition" to find some *legal* basis for charging a crime at the expense of Respondents' liberty—nor should it.

### B. Respondents' Fourth Amendment Right To Be Free from LACSD Petitioners' Unreasonable Seizure Was Clearly Established.

There is no dispute that Respondents were not free to leave during the seventy-five minute detention and were, therefore, deprived of their liberty under the authority of law. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (holding that a person has been "seized" within the meaning of the Fourth Amendment when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave"); *see also United States v. Richardson*, 949 F.2d 851, 856-57 (6th Cir. 1991) ("It does not take formal words of arrest or booking at a police station to complete an arrest. It takes simply the deprivation of liberty under the authority of law.") (internal quotations and citations omitted); *Centanni v. Eight Unknown Officers*, 15 F.3d 587, 590 (6th Cir. 1994) (noting that a clear deprivation of liberty without formal words is nonetheless an arrest).

Moreover, "[t]he brevity and limited nature of *Terry*-type stops have been repeatedly affirmed." *United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000); *see also Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his

identity and to try to obtain information confirming or dispelling the officer's suspicion. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.") (footnotes omitted). And while there are no rigid time limitations, there are certainly limitations, which Petitioners exceeded. *See United States v. Chamberlin*, 644 F.2d 1262, 1267 (9th Cir. 1980) (holding that a 20-minute detention was unreasonable and noting that the defendant was not free to leave, as admitted by the officer, and that the officer detained the defendant "to find out what was going on"); *United States v. Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974) (stating that the detention "for over an hour cannot be considered a 'brief' or 'momentary' stop").

When assessing the reasonableness, and thus the legality, of LACSD Petitioners' actions, the crucial inquiry is "whether the police diligently pursued a means of *investigation* that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Sharpe*, 470 U.S. 675, 686 (1985) (emphasis added). And as the Ninth Circuit properly noted, "The investigative purposes permitted by detention are ones of fact, not law." App. at 31a.

In this case, LACSD Petitioners did not "diligently" pursue their investigation.[14] Rather, they held Respondents, preventing them from exercising their

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[14] In fact, LACSD Petitioners waited for *more than an hour* before speaking to any school officials, and this was a very brief conversation. ER-109-10, 161.

First Amendment rights, while the deputies fished for a violation of the law. *See, e.g., United States v. Chavez-Valenzuela*, 268 F.3d 719, 724 (9th Cir. 2001), *amended by* 279 F.3d 1062 (2002) (holding that the prolonged, investigatory detention of the defendant violated the Fourth Amendment and that the subsequent search of the defendant's vehicle was unlawful, finding that the officer took advantage of the 7-minute records-check delay to engage in a "fishing expedition").

In sum, the Fourth Amendment standards applicable here were clearly established—and clearly violated by the deputies. Consequently, the Ninth Circuit properly held that LACSD Petitioners do not enjoy qualified immunity for their unreasonable detention of Respondents.

## CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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